469

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. ~~1225.~~ 482 219

LUIGI FILIBERTO, FREDERICK FILIBERTO, FRANKLIN ROLFE AND FREDERICK GUILD, JR., APPELLANTS,

vs.

THE BARQUE "JOHN H. PEARSON," HIRAM TAYLOR, CLAIMANT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED DECEMBER 7, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 1225.

LUIGI FILIBERTO, FREDERICK FILIBERTO, FRANKLIN ROLFE AND FREDERICK GUILD, JR., APPELLANTS,

vs.

THE BARQUE "JOHN H. PEARSON," HIRAM TAYLOR, CLAIMANT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

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1 UNITED STATES OF AMERICA, } ss.
MASSACHUSETTS DISTRICT. }

At a Circuit Court of the United States for the First Circuit, begun and holden at Boston, within and for the District of Massachusetts, on Tuesday, the fifteenth day of May, in the year of our Lord one thousand eight hundred and eighty-three.

Before the Honorable John Lowell, Circuit Judge.

No. 1782. In Admiralty.

The John H. Pearson.

LUIGI FILIBERTO ET AL., LIBELANTS, Appellants,
vs.
HIRAM TAYLOR, CLAIMANT, APPELEE.

2 The transcript of the record of the District Court of the United States for this district in this cause was duly filed and entered here at the October term of this court, A. D. 1881, and is in the words and figures following:

3 UNITED STATES OF AMERICA, } ss.
DISTRICT OF MASSACHUSETTS. }

At the District Court of the United States, begun and holden at Boston, within and for the District of Massachusetts, on the fourth Tuesday (being the twenty-eighth day) of June, in the year of our Lord one thousand eight hundred and eighty-one.

Before the Hon. Thomas L. Nelson, Judge.

LUIGI FILIBERTO, ET AL., LIBELANTS,
vs.
THE BARK JOHN H. PEARSON.

This libel was filed in court on the 17th day of May, A. D. 1881, and is as follows, viz:

UNITED STATES OF AMERICA, }
DISTRICT OF MASSACHUSETTS. }

To the Hon. Thomas L. Nelson, Judge of the District Court of the United States within and for the District of Massachusetts:

The libel and complaint of Luigi Filiberto and Frederick Filiberto, of Palermo, on the island of Sicily, merchants, co-partners under the firm name of R. Filiberto & Company, and of Franklin Rolfe and Frederick Guild, Junior, of Boston, in said District of Massachusetts, merchants, co-partners under the firm name of Rolfe & Guild, against the bark John H. Pearson, of said

Boston, whereof Sewall Lancaster, of Searsport, in Maine, is, or late was, master, her tackle, apparel, and furniture, in a cause of contract; and thereupon said libelants allege and articulately propound as follows:

First. That on or about the fourteenth day of October, A. D. 1880, a contract of charter-party was entered into and executed at said Palermo, between said firm of R. Filiberto & Company, and W. B. Byrnes, of said Boston, as agent and part owner of
4 said bark John H. Pearson, whereby it was agreed that said bark, which was then bound to Cette, being tight, staunch, strong, and in every way fitted for the voyage, should, after discharging her outward cargo at Cette, sail and proceed in ballast direct to Palermo, and there load a full and complete cargo of fruit, or other lawful merchandise; ballast of sulphur, if any, not to exceed one hundred tons; and therewith proceed direct to either New York, Philadelphia, Boston, or Baltimore, at charterers' option, as ordered on signing bills of lading, and there deliver the same, on being paid freight, the lump sum of sixteen hundred and fifty United States dollars in full, the master engaging himself to take the northern passage.

Second. That on or about the fourth day of January, A. D. 1881, a cargo of fruit, consisting of seven thousand six hundred and forty boxes of oranges and lemons, was shipped, in good order, upon said bark, then lying at Palermo, and bound for Boston, by R. Filiberto & Company, and a bill of lading was delivered by said master to the said charterers, said Boston having been then and there determined upon by said charterers, in the exercise of their option, as the port of destination and delivery; and said bill of lading was delivered to Messrs. Baring Brothers & Company, and by them indorsed in blank, and delivered to said libelants, Rolfe & Guild. The said charter-party was executed by said R. Filiberto & Company on behalf of themselves and of the said Rolfe & Guild, who were interested with them in said shipment and contract in equal shares.

Third. That on or about the sixth day of January, A. D. 1881, said bark John H. Pearson sailed from Palermo, and reached said port of Boston, on Monday, the second day of May, A. D. 1881, and said cargo was there discharged in bad order and condition, and so greatly deteriorated by decay as to be almost worthless. And the libelants allege that said master did not take the northern passage, as stipulated in said charter-party, where the air and the water would have been so cold as to have preserved said fruit in good order, and prevented it from decaying; but sailed as far south as north latitude thirty-three, and, by reason of the warmth of the water and air in said latitude, said cargo became heated and decayed, and became of little or no value.

Fourth. That said master did not exercise the proper and necessary care in the ventilation of said fruit, by the opening of the hatches and otherwise; and did not use the proper care and skill

in navigating his course, but occasioned great and unnecessary delay in making his passage to Boston, by taking a southern course, and making a point too far south on the American coast, involving many days of unnecessary delay, and in a warm latitude, whereby said fruit was greatly injured.

5 Fifth. That the said cargo was of the fair market value of about twenty-five thousand dollars, when in good condition; but that, by reason of said decay, it was, when delivered, worth only about three thousand dollars ($3,000), whereby these libelants are damaged to the amount of about twenty thousand dollars; and the fair value of said bark is about twelve thousand dollars.

Sixth. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of this honorable court. In verification whereof, if denied, the libelants crave leave to refer to the depositions and other proofs to be by them exhibited in this case.

Seventh. Wherefore the libelants pray that process in due form of law, according to the course of courts of admiralty and of this honorable court, in causes of admiralty and maritime jurisdiction, may issue against the said bark John H. Pearson, her tackle, apparel, and furniture; and that all persons having, or pretending to have, any right, title, or interest in said bark, may be cited to appear and answer all and singular the matters so articulately propounded, and that this honorable court will be pleased to decree the payment of the damages aforesaid with costs; and that the said vessel may be condemned and sold to pay the same; and that these libelants may have such other and further relief in the premises as in law and justice they may be entitled to receive.

R. FILIBERTO & CO.
ROLFE & GUILD,
By FREDERICK GUILD JR.

H. W. PUTNAM, *Libelant's Proctor.*

COMMONWEALTH AND DISTRICT OF MASSACHUSETS.

SUFFOLK, *ss.* MAY 10, 1881.

Sworn to by said Frederick Guild, Junior, before me,

[SEAL.] CHARLES ALMY, JR.,
Notary Public.

6 *Stipulations for Costs and Expenses.*

On the 19th day of May, A. D. 1881, before this court personally appeared Hiram Taylor, of Chatham, in the District of Massachusetts, master of said bark, and produced for sureties Gustavus Ryder, of Chelsea, and William B. Byrnes, of Boston, both in said district. And the said Taylor, Ryder, and Byrnes, submitting themselves to the jurisdiction of this court, bound themselves, their heirs, executors, and administrators, jointly and severally, in the sum

of two hundred dollars, unto the said libelants, that the said Taylor should pay all costs and expenses which should be awarded against him in this suit upon the final adjudication thereof, or by any interlocutory order, whether it be in this or any appelate court.

Stipulation to the Action.

On said 19th day of May, A. D. 1881, before this court personally appeared Hiram Taylor, of Chatham, in the District of Massachusetts, master of said bark, and produced for sureties Gustavus Ryder, of Chelsea, and William B. Byrnes, of Boston, both in said district. And the ssid Taylor, Ryder, and Byrnes, submitting themselves to the jurisdiction of this court, bound themselves, their heirs, executors, and administrators, jointly and severally, in the sum of seven thousand dollars, unto the said libelants, that the said Taylor should abide by all orders and decrees, interlocutory or final, of the court, and should pay the amount of the final decree of the court, and all sums of money that he should be ordered to pay by the final decree of the court, whether it be in this or any appelate court.

On the 25th day of May, A. D. 1881, the following answer was filed in court, viz:

District Court U. S., District of Massachusetts, in Admiralty.

LUIGI FILIBERTO ET AL.
v.
BARK JOHN H. PEARSON

The answer of Hiram Taylor, master and part owner of the bark John H. Pearson, on behalf of himself and the other owners of said bark, to the libel and complaint of Luigi Filiberto and others against said bark, her tackle, etc. And thereupon said respondent alleges and articulately propounds as follows, viz:

7 First. He admits that, on or about October 14, 1880, a charter of said bark was made between said firm of Filiberto & Co. and the owners of said vessel, containing, in substance, the stipulations set forth in the first article of said libel; but, for greater certainty, he will require the production of the original charter-party at the hearing.

Second. He admits that, on or about January 4, 1881, a cargo was shipped on board said bark, at said Palermo, by said Filiberto & Co., in pursuance of said charter-party, and that a part of said cargo was oranges and lemons in boxes, and that the number of said boxes was as stated in the second article of said libel. He admits that said boxes of oranges and lemons were in good order when shipped, so far as their outward appearance was concerned. But he is ignorant as to the actual condition of the contents of said boxes at the time of shipment, and can, therefore, neither admit nor

deny that the same were in good order, but leaves said libelant to prove the same, if material. He admits that a bill of lading, for said boxes of oranges and lemons, was delivered to said charterers by the master then in command of said vessel; but he does not know whether or not the allegations respecting the delivery thereof to Baring Bros. & Co., and its indorsement by them to said libelants, Rolfe & Guild, are or are not true; and, therefore, neither admits nor denies them, but leaves said libelants to prove them, if material.

He does not know on whose behalf, if on any one's but their own, said charter-party was executed by said Filiberto & Co.; nor who, if any one, was interested with them in said shipment, nor upon what terms; and, therefore, he neither admits nor denies the allegations of said libel upon these points, but leaves said libelants to prove them, if material.

Third. In answer to the third article of said libel, he admits that said bark sailed from Palermo, and reached Boston on the dates therein alleged, and that said cargo was there discharged. And he alleges that said boxes of oranges and lemons were there delivered to and accepted by said libelants, Rolfe & Guild, under said bill of lading, and that the entire number of boxes of oranges and lemons stated above, and in the bills of lading, were so delivered to and accepted by said Rolfe & Guild. He is informed and believes, and therefore admits, that said oranges and lemons were, when delivered, in bad order and condition; but he denies that they were almost worthless, as alleged. He denies that said master did not take the northern passage, as stipulated in said charter-party, but alleges that said master complied fully with the stipulations of the charter-party in this and every other respect. He admits that said vessel was, at one period of her voyage, and for a few hours
8 only, as far south as north latitude 33 degrees, and, he alleges, that the most of her voyage in the Atlantic Ocean was made much further to the north. He denies that said cargo received any injury whatever on account of the warmth of the water or air, at any period of the voyage in the Atlantic Ocean.

Fourth. Said respondent denies that said master failed in the exercise of proper care or skill in the ventilation of said cargo on said voyage, or in navigating his course, or that he caused any unnecessary delay whatever in coming to Boston, in any respect. And he alleges that all possible care was used in ventilating said cargo on said voyage, and in making the passage to Boston, and that the same was made in the best possible manner, under all the circumstances, and in all respects according to the agreements of said charter-party.

Fifth. Said respondent does not know whether or not the allegations of the fifth article of said libel are true, and can therefore neither admit nor deny them; but he leaves said libelants to prove

them, if material; except that he denies that the value of said bark is twelve thousand dollars.

Sixth. That all the agreements of said charter-party, to be kept and performed on the part of said vessel, were well and truly kept and performed by her, and that the damage to said cargo was not caused by any foult or negligence on her part, or by failure to perform any of said agreements, but by the inherent tendency of said fruit to decay, together with the unusual length of the passage. And he avers that said passage was made unusually long through no fault on the part of said vessel; but solely by reason of head winds and heavy sea, encountered by said vessel, and which continued during nearly the entire voyage.

Seventh. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore the said respondent prays that said libel may be dismissed, and for his costs. HIRAM TAYLOR.

UNITED STATES OF AMERICA,
STATE AND DISTRICT OF MASS. }

SUFFOLK, *ss.*

Boston, May 23, 1881. Subscribed and sworn to by said Hiram Taylor, as true to the best of his knowledge, information, and belief, before me.

Witness my hand and notarial seal at said Boston, the day and year above written.

[SEAL.] FREDERIC DODGE,
Notary Public.

9 This libel was entered at the March term of this court, A. D. 1881, and thence was continued to this present term. And now, on this 31st day of August, A. D. 1881, after full hearing of the cause upon the facts proved, and arguments of counsel, and mature deliberation thereon had, the court doth order, adjudge, and decree that said libel do stand dismissed, with costs for respondent.

On said 31st day of August, A. D. 1881, the following prayer for an appeal was filed in court, viz:

District Court U. S., District of Massachusetts, in Admiralty.

LUIGI FILIBERTO ET AL.
v.
THE BARK JOHN H. PEARSON. }

In the above-entitled suit the libelants appeal from the decision of the judge of said court, dismissing the libelant with costs, and pray that their appeal may be allowed.

H. W. PUTNAM,
Proctor for Libelants.

And thereupon said appeal is allowed by the court.

I, Elisha Bassett, deputy clerk of the District Court of the United States within and for the District of Massachusetts, hereby certify that the foregoing is a transcript of the record of the said court in the said cause, made up pursuant to Admiralty Rule No. 53.

In witness whereof I have hereunto subscribed by name and affixed the seal of said court, this nineteenth day of October, A. D. 1881.

[SEAL.] ELISHA BASSETT,
Deputy Clerk.

10 Upon the entry of this cause in this circuit court as aforesaid, the parties appeared, by their respective attorneys, and this cause was thence continued to the May term of this court, A. D. 1882, when the same was set down for hearing and fully heard, and thence was continued, under advisement, to the October term of this court, A. D. 1882, when, on the twenty-ninth day of December, A. D. 1882, the opinion of the court was announced.

This cause was thence continued to the present May term of this court, A. D. 1883, when, on the sixth day of October, A. D. 1883, the following findings of fact by the court, libelant's prayers for rulings, and conclusions of law by the court are filed:

Findings of Fact by the Court.

1. The bark John H. Pearson was chartered to bring a
11 cargo, consisting mostly of oranges, for the libelants from Palermo to Boston.

The charter-party (Exhibit A) contained the words "captain engages himself to take the northern passage," inserted at the instance of the libelants for the benefit of the cargo, and written into a printed blank. Exhibit B is a copy of the bill of lading which was duly endorsed and delivered to the libelants, all of whom were jointly interested in the charter-party and the cargo.

2. The vessel sailed from Palermo January 7th, 1881, arrived at Gibraltar February 18th, waited there one day for stores, sailed February 19th, met with severe weather, and reached Boston May 2d, after an unusually long passage both in the Mediterranean and in the Atlantic. The course of the vessel from Gibraltar is shown upon Exhibit C, a chart of the North Atlantic Ocean, with
12 the successive positions of the vessel from day to day at noon marked thereon by red dots connected by red lines, the initial letter of the month and the number of the day of the the month being placed at each point. The cargo was damaged by decay to the extent of eighty-seven per cent. of what its market value would have been had it reached Boston in a sound condition. That value would have been $22,000.00.

3. Shippers of fruit consider it of very great importance for

the preservation of the cargo that it be kept in as cold a temperature as possible short of the freezing point, and have been accustomed for many years to instruct masters to take a northerly course.

There is always some decay during the voyage from Sicily to Boston. This is more likely to occur in the Mediterranean than on the Atlantic. The Mediterranean part of the voyage
13 was unusually long in this case.

4. The master, upon the day of his arrival, and while the ship was coming into the dock, stated, in answer to an inquiry addressed to him by a news agent, in no way connected with or representing any person interested in either the vessel or the cargo, that he had taken the middle passage.

The actual course sailed by the vessel was never in dispute between the parties.

5. There were times when the master could have gone farther north than he did; and therefore he did not take as northerly a course as he might have.

6. The passage from Gibraltar direct to the banks, and thence north of the gulf stream direct to Boston, was said by several
14 witnesses to be quicker on the average, taking one voyage with another, than what they called the middle passage, that is, one farther south, but north of the trade winds.

7. The gulf stream has a strong easterly current from the American coast of the United States eastward to about longitude 45° or 50° west; and north of it there is a strong counter current flowing in a westerly and southwesterly direction. The stream is also narrowest and best defined during this part of its course, after which, as it goes eastward, it rapidly becomes less well defined and broader.

Its waters are considerably warmer than those of the ocean north of it. The difference is greater on the north than on the south, owing to the fact that there is a cold current between it and the American coast moving in an opposite direction. The tem-
15 perature of the waters of the gulf stream grows higher and its current stronger as one goes westward along its track.

Storms are particularly prevalent in the latitudes of the gulf stream in about longitude 50° west; that region is known as the stormy region of the gulf stream, and was so indicated in print upon the chart of the master of the bark John H. Pearson.

8. Upon April 7th, when the master turned towards the south, he could have turned towards the north. On the 4th of April, during the gale, the rudder-head of the bark was injured and weakened, and there was thereafter some difficulty in working the rudder, although the difficulty did not, in fact, interfere with carrying sail or laying the course.

The passage had, on April 7th, been an unusually long one, both

in the Mediterranean and upon the Atlantic; from about
16 March 23d there had been nearly a continuous westerly gale, which had not completely subsided on April 7th, during which time the bark could make little or no progress to the westward; the bark was a slow sailer, and the master had no thermometer on board.

During the passage from Gibraltar to Boston the master noticed that the cargo was heating badly all the way, and that when about half-way across it commenced to steam, and the steam commenced to escape from the hatches. He noticed also a mouldy, musty smell. This was first noticed some days before he reached Gibraltar. About ten days before he arrived at Boston flies were noticed in the cargo.

9. Another vessel named the Messel, which left Cicily twelve days after the John H. Pearson, with a cargo of oranges
17 and lemons, also bound for Boston, left Gibraltar upon the same day as the John H. Pearson did, and reached Boston the evening before the John H. Pearson did with her cargo damaged by decay to the extent of only 15 per cent. of its market value.

The successive positions of the "Messel" are shown upon Exhibit C by red dots connected by red dotted lines, the initial letter of the month and the number of the day of the month being placed at each point.

Libelants' Prayers for Rulings.

1. Upon the facts found, the true construction of the charter-party calls for a more northerly passage than that taken by the bark.

2. Upon the facts found, the true construction of the charter-
18 party calls for a more northerly passage than that taken by the bark, unless the claimant proves by a fair preponderance of the testimony of merchants and seamen that a course as far south as that taken by the bark comes within the meaning of the term the "northern passage," as understood among them.

3. The true meaning of the term "the northern passage" is to be determined as a fact—upon a conflict of the testimony of merchants and seamen as to its meaning—by the fair preponderance of the evidence. If such preponderance favors the construction of the libelants a breach of the contract is established; if the testimony on the one side and the other is so evenly balanced that the court remains in doubt, and cannot determine which way the preponderance is, then the construction of the libelants should
19 be adopted, as most consonant with the natural meaning of the words used and with the purpose contemplated by the parties; as the most definite and intelligible; as the one understood by the master himself as well as the libelants; and as the

strictest against the shipowners—the parties using the words in question—and in favor of the cargo.

4. The facts found show such negligence on the part of the master as to render the owners liable in damages for the injury to the cargo.

The court refused to make these rulings, and, instead thereof, stated the conclusions of law hereinafter set forth:

20 *Conclusions of Law by the Court.*

1. The term "northern passage" appears, in view of the testimony of merchants and seamen introduced on both sides, to be a term of art, and is, when taken by itself, without the aid of such testimony, unintelligible.

The testimony introduced by the libelants tended to show that the phrase meant a passage from Gibraltar to the Great Banks, and thence direct to Boston, keeping as much to the north as possible during the entire passage; that anything between that and the southern passage was the middle passage.

That introduced by the claimant tended to show that it meant anything north of latitudes 30° to 35° or 36°, or of the southern passage; and that the middle passage was anything between
21 the southern passage and the northern as described by the respective witnesses.

It was admitted that the southern passage was in the trade winds.

2. Upon this testimony the court, thinking that the true meaning of the term is very doubtful, does not consider it material and does not undertake to decide whether a preponderance of the evidence favors one of the above definitions or another, and rules that the claimant is entitled to the least strict definition, and that as the course of the bark comes within such definition there is no deviation.

3. The facts found do not show such negligence on the part of the master as to render the owners liable in damages for the injury to the cargo.

22 To all which conclusions of law, rulings, and refusals to rule, the libelants duly excepted, and their exceptions are hereby allowed.

JOHN LOWELL,
Circuit Judge.

23 *Exhibit "A."*

Antonino Trifiletti & F.,
Ship Brokers,
Palermo.

Charter-party.

PALERMO, 14*th October*, 1880.

It is this day agreed between W. B. Byrnes, agent and part owner of the good American bark called the "John H. Pearson,"

A 1½ and coppered, of the burthen of 423 reg. tons or thereabouts, now bound to Cette, and Messrs. R. Filiberto & Co., of Palermo, merchants,

That the said ship, being tight, staunch, strong, and in every way fitted for the voyage, shall, after discharged her outward cargo at Cette, sail and proceed in ballast direct to Palermo, and there load a full and complete cargo of fruit and (or) other lawful merchandise.

24 Ballast of sulphur, if any, not to exceed one hundred tons.

Which the said merchant bind themselves, agent or agents, to ship, not exceeding what she can reasonably stow and carry, over and above her tackle, apparel, provision, and furniture; and being so loaded, and on the master signing usual bills of lading, (without any prejudice to the present charter-party), at such rates as the charterer may wish, reserving his claim only for the sum or sums mentioned in this charter-party, shall therewith proceed direct to either New York, Philadelphia, Boston, or Baltimore, at charterer's option, as ordered on signing bills of lading, or so near thereto as she may safely get, and there deliver the same, according to bills of lading, on being paid freight in lieu of all port charges, pilotages, or any other charges or dues on the vessel; (those on the cargo to be borne by the receiver of the same);

25 lump sum sixteen hundred and fifty U. S. dollars in full.

The acts of God, restraint of princes and rules, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever during the said voyage, always accepted. The freight to be paid in cash on a true and right delivery of the cargo, the cargo to be brought and taken to and from alongside the vessel at the charterer's risk and expenses. Cash for ships' disbursements to be advanced by the charterers free of interest and commission, but subject to insurance not exceeding ⅓ of freight. Mats and dunnage at the charterer's expenses.

Captain engages himself to take the northern passage.

Twenty running days are to be allowed the said merchant (if the ship be not sooner dispatched) for loading the said ship, to

26 commence at Palermo, when in free pratique, enter at the custom house, and ready to load, finish when laden.

And to unload according to custom of respective ports.

The boxes of fruit to be stowed with the usual ventilation as customary for the United States.

The charterer shall have the full reach of the vessel's hold from bulk-head to bulk-heads, including half deck, and no goods to be received on board without a written order from the charterer. Stevedores to be provided by the charterers at ship's expense.

The brokerage on this charter is at the rate of five per cent. by the ship on the gross amount of freight, primage, and demurrage,

and is due to A. Trifiletti & F. on the signing of this agreement, ship lost or not lost.

27 And ten days on demurrage over and above the said laying days at forty dollars per day.

Penalty for non-performance of this agreement amount of freight.

Witness. (Signed) W. B. BYRNES.
R. FILIBERTO & CO.

28 *Exhibit "B."*

Shipped in good order and condition by R. Filiberto & Co., in and upon the good bark called the John H. Pearson, whereof S. Lancaster is master for this present voyage, and now lying at Palermo, and bound for Boston, seven thousand six hundred and forty boxes oranges and lemons, being marked and numbered as per margin, and are to be delivered in the like good order and condition at the aforesaid port of Boston, all and every the dangers and accidents of the seas and navigation of whatsoever nature or kind excepted, unto Messrs. Baring Brothers & Co., or to their assigns, he or they paying freight for the said goods, as per charter-party. If steam is taken going through the straits of Gibraltar, half the expense to be borne by the shippers of fruit, pro rata.

In witness whereof the master or purser of the said ship
29 has subscribed five bills of lading all of this tenor and date, one of which being accomplished, the rest to stand void. Dated in Palermo the 4th January, 1881.

Weight and contents unknown.

(Signed) SEWALL LANCASTER.

Indorsed: For Baring Brothers & Co.
(Signed) KIDDER, PEABODY & CO.,
Attys.

[Here follows map marked page 30.]

31 Thereupon the following final decree is entered:

Final Decree.

And now, to wit, October 6th, 1883, it is ordered, adjudged, and decreed that the decree of the district court in this cause be, and the same is hereby, affirmed, with costs for the appellee, and that the said libel be, and the same is hereby, dismissed, with costs for the said Hiram Taylor, respondent and appellee, taxed at .

From this final decree the libelants claim an appeal to the Supreme Court of the United States, and give good and sufficient security that they will prosecute their appeal to effect, and said appeal is allowed by the court.

A true record.

Attest: JOHN G. STETSON, *Clerk.*

32 The following is a copy of opinion of the court (with a statement of the case made by the court prefixed thereto) in accordance with which the final decree was entered in this cause on this sixth day of October, 1883:

33 Circuit Court of the United States, District of Massachusetts, in Admiralty.

The John H. Pearson.

LUIGI FILIBERTO ET AL., LIBELANTS, APPELLANTS, *v.* HIRAM TAYLOR, CLAIMANT, APPELLEE. } No. 1782.

FRANKLIN ROLFE ET AL., DEFENDANTS, APPELLANTS, *v.* HIRAM TAYLOR, LIBELANT, APPELLEE. } No. 1783.

Statement of the Case.

The barque John H. Pearson was chartered to bring a cargo of oranges and lemons for the libelants from Palermo to Boston. The charter-party contained the words "Captain engages himself to take the northern passage," inserted at the order of the libelants. The vessel sailed from Palermo January 7, 1881, arrived at Gibraltar February 18, waited there one day for stores, sailed February 19, met with severe weather and reached Boston May 2. The cargo was very seriously damaged. The course of the vessel from Gibraltar to Boston was a little to the south of the latitude of the Azores, averaging about latitude 36° N., but lay south of this latitude for a few days, the lowest point being 33° 18′. The libel alleged that the master failed to take the northern passage; and exercised bad judgment in not keeping more to the north.

The witnesses on behalf of the libelants testified that the
34 northern passage was understood to be a passage north of the Azores to the "tail" of the Great Banks and then home, and that the course of the vessel was in what is known as the middle passage. Some of the witnesses on the part of the ship deposed that the northern passage was whatever was not southern; others, that it was anything north of 30° to 35° or 36°, varying somewhat with different witnesses. There was no dispute that the southern passage was further south than this vessel went, namely, in the region of the trade winds, which is about 18° to 28° N. There was cross-libel for freight. The district court dismissed the libel for image, and decreed for the libelants in the libel for freight.

H. W. PUTNAM, *for the libelants.*

F. DODGE, *for the claimants.*

Opinion of the Court. December 29, 1882.

Lowell, J. I have examined the evidence with great care, remembering that my decision of facts is final.

The evidence for the libelants tended to prove the importance of cargoes of fruit being kept cool, and that fruit dealers owning ships had been in the habit of instructing their masters to take the northern passage, not, as I understand it, usually if ever in those words, but to keep a northerly course, which had come to be considered the northern passage, and that this was north of the Azores, if possible, and, if not possible, north of the latitude of the Azores as soon as possible. They said that when ships were chartered, especially within the last eight or ten years, the charter-parties had contained clauses binding the master to take this course. They introduced two charter-parties, C and D, which contained an agreement, that after leaving Gibraltar, the vessel should go to the northward of the Western Islands, if practicable, and keep
35 north of that latitude unless forced south by stress of weather, in which case the log book should furnish evidence of the fact. A third, containing an exactly similar clause, was put in by the defendants, on which was indorsed that should adverse winds prevent the vessel from going northward of the Western Islands, the captain might sail south down to latitude 34. These clauses agreed exactly with the definition of the libelants' witnesses, who deposed, besides, that the course taken by this vessel was known as the middle passage.

The witnesses for the ship, consisting of ship masters and ship brokers, said that the northern passage was anything which was not southern, or that it was any passage above 30° to 35° or 36°, varying somewhat. They considered the instructions were given, or inserted in charter-parties, to prevent masters from taking the easy and comfortable passage where the trade winds prevail. The claimants introduced three charter-parties, E, G, and H, one of which contains the agreement that the master should not go below latitude 34°; another that he should not go south of 32°, and the third established 30° as the southern limit.

The district judge decided that the libelants were bound to show the meaning of the clause which they had caused to be put into the charter-party, and its breach, and that they had failed to do so. In the conflict of oral testimony he relied a good deal on the charter-parties, one-half of which were favorable to the defendant's views of the subject. It is now argued by the libelants that they are of little value in the discussion, but it seems difficult to overvalue them. Those favorable to the libelants were put in by them for the very purpose of showing what was the northern passage, and much of the oral evidence was made up simply of a recollection of similar clauses. The contracts favoring the defendants
36 have precisely as much bearing on the question. They show what latitudes the parties making them considered high enough for safety. The point in dispute was what has come to be, by general consent, the northern or safe passage for fruit, insisted on in contracts and instructions to masters. Those charter-parties confirm

very strongly the defendants' contention, that anything north ot about 30° was a or the northern passage. There is no satisfactory evidence that the words "northern passage" were ever written into any contract before this charter-party was made.

When the libelants who testified here instructed their correspondent in Palermo to insert an agreement for the northern passage, they might properly have expected him to define a course for the vessel. If he had done so, who can say whether he would have defined it like C and D, or like E, G, or H?

Again, the libelants argue that the district judge was wrong in requiring them to prove that the contract has the construction which they contend for, citing *Funcheon* v. *Harrey*, 119 Mass. 469. In that case the master sued for freight under a charter-party which required him to take on board at St. John's, Newfoundland, a cargo of fish, with all convenient speed, and proceed to Cuba "direct." The fish was spoiled, and there was evidence tending to show delay, deviation, and negligence by the plaintiff. The court held that the burden was on the plaintiff to make out his whole case, including due diligence. No doubt that was a sound decision; but, by parity of reasoning, if the action had been against the master for the damage, the then plaintiffs (defendants in the principal case) would have the burden of proof to show a breach of the contract; and it follows, that if I am to go by burden of proof, I must decide one of these cross-actions one way, and the other the opposite way. The burden of proof is of very little importance in most cases, and of almost none in the construction of a written contract, and I do not understand that Judge
37 Nelson relied upon it; what I suppose him to have intended to say, and what I say is, that if the contract contained a technical phrase, subjecting the master to an unusual duty, that phrase must be made clear by evidence, or else that part of the contract is unintelligible; or, if there are two constructions, the master might safely adopt either, without stopping to inquire whether a few more persons believe it to mean the one than those who thought it to mean the other. In this sense the burden is on the shippers in both cases.

I have not overlooked the evidence which seems to show that the master admitted to a witness that he had taken the middle passage. From this it has been argued with much force that, whatever may be the meaning of such a contract when made by others, these parties both understood that there is a middle passage distinct from the northern one, and that it is where the libelants say it is. After some hesitation, I have decided that this admission of the master must be taken like any other piece of evidence tending to show the meaning of the technical phrase, and not as concluding him and his co-owners upon the whole merits of the case.

Upon the whole evidence, I am of opinion that there was no technical deviation.

Nor was there such negligence as should require the ship to pay for the loss. There was a day when the master might have turned towards the north when he did turn towards the south; at least I think the preponderance of the evidence is so. But in these matters much discretion must be left to the master, who is on the spot, and who must decide at short notice. No ship could safely take a perishable cargo, if an error of judgment, not amounting to a rash and almost criminal negligence, should render the owners liable to damages.

Decrees affirmed.

38 UNITED STATES OF AMERICA, } *ss.*
MASSACHUSETTS DISTRICT, }

I, John G. Stetson, clerk of the Circuit Court of the United States for the District of Massachusetts, in the First Judicial Circuit, certify that the foregoing is a true copy of the record in the cause in admiralty entitled The John H. Pearson, Luigi Filiberto *et al.*, libelants, appellants, *v.* Hiram Taylor, claimant, appellee, lately determined in said circuit court, and of the opinion of the court therein.

In testimony whereof I hereunto set my hand and affix
39 the seal of said circuit court, at Boston, in said district, this sixth day of October, A. D. 1883, and of the independence of the United States of America the one hundred and eighth.

[SEAL.] JOHN G. STETSON, *Clerk.*

40 *Bond to Party on Appeal.*

Know all men by these presents, that we, Franklin Rolfe and Frederick Guild, Jr., both of Boston, in the State and District of Massachusetts, for ourselves and for Luigi Filiberto and Frederick Filiberto, of Palermo, Sicily, as principals, and Francis C. Butman, of Salem, and Frederic Guild, of Boston, as sureties, are held and firmly bound unto Hiram Taylor, of Chatham, Massachusetts, in the full and just sum of five hundred dollars, to be paid to the said Taylor, his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated the sixth day of October, in the year of our Lord one thousand eight hundred and eighty-three.

Whereas lately at a Circuit Court of the United States within and for the District of Massachusetts, in a suit in admiralty depending in said court between Luigi Filiberto, Frederick Filiberto, Franklin Rolfe and Frederick Guild, Jr., libelants, appellants, and the bark John H. Pearson, of said Boston, Hiram Taylor being claimant thereof and appellee, decree was rendered against the said libelants, appellants, and the said libelants, appellants, having ob-

tained an appeal to remove the said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Hiram Taylor, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October, current:

Now, the condition of the above obligation is such, that if the said libelants, appellants, shall prosecute their said appeal to effect, and answer all damages and costs, if they fail to make their plea good, then the above obligation to be null and void, otherwise to remain in full force and virtue.

Signed, sealed, and delivered in presence of C. W. BOYNTON, witness to both signatures.

FRANKLIN ROLFE. [L. S.]
FREDERICK GUILD, JR. [L. S.]

D. DUDLEY HALL, witness to F. C. B.
W. O. WITHERELL, witness to F. G.

FRANCIS C. BUTMAN. [L. S.]
FREDERIC GUILD. [L. S.]

Sureties approved.

THOMAS L. NELSON,
U. S. Dist. Judge.

A true copy of the bond taken by the judge at the time of allowing the appeal named in said bond, which bond is on file in the office of the clerk of the Circuit Court of the United States for the First Circuit and District of Massachusetts.

Attest: JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

(Endored on cover:) Massachusetts C. C. U. S. No. 1225. Luigi Filiberto, Frederick Filiberto, Franklin Rolfe, and Frederick Guild, Jr., appellants, vs. The Barque "John H. Pearson," Hiram Taylor, claimant. Filed 7th December, 1883.

121-469

Supreme Court of the United States.

LUIGI FILIBERTO ET AL., APPELLANTS,

v.

THE BARK "JOHN H. PEARSON."

BRIEF FOR THE APPELLANTS.

HENRY W. PUTNAM,

Of Counsel for the Appellants.

BOSTON:
PRESS OF ROCKWELL AND CHURCHILL,
No. 39 ARCH STREET.
1886.

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LUIGI FILIBERTO ET AL., APPELLANTS,

v.

THE BARK "JOHN H. PEARSON."

BRIEF FOR THE APPELLANTS.

(*Pages referred to are those of the Record when not otherwise stated.*)

STATEMENT OF THE CASE.

THE FACTS.

This is a libel against the bark "John H. Pearson" to recover damages for the injury done by decay to a cargo of 7,640 boxes of oranges and lemons belonging to the libellants (appellants) and shipped in good order on the bark Jan. 4, 1881, at Palermo, Sicily, for Boston. (See Exhibit "B.")

The contract of affreightment, on which the cause of action arises, consists of a bill of lading (Exhibit "B," p. 12) in ordinary form signed by the master, and a charter-party (Exhibit "A") containing the stipulation, "Captain engages himself to take the northern passage." The libel alleges a breach of this stipulation, and generally negligence in not taking a northerly and cooler course. The answer alleges that the vessel did take the northern passage, and that the master's action was not negligence. Damages are alleged in the sum of $20,000. The cargo was, in fact, almost totally destroyed, — its value being $22,000, and the damage 87 per cent., or $19,140. (See 2d Finding, p. 7.) The stipulation to the action is in the sum of $7,000. (Record, p. 4.)

The charter-party (p. 11) required the master, on leaving Palermo, to "proceed *direct* to . . . Boston," and to "take *the northern passage.*"

Upon Exhibit "C" the "direct" from Gibraltar to Boston is shown by the fine red line passing through the Azores, a W. by N. course. "The northern passage," according to our view, is shown by the upper thick red line, *i.e.*, simply a northwardly or northerly passage, about a W.N.W. course; and indeed the least northerly course that could naturally be called "northern" at all — for it will be noticed that it passes just to the northward of the Azores which lie across the "direct" — reaches the latitude of Boston at the Great Bank, and thence goes straight to port north of the Gulf Stream. Described briefly, and by a natural landmark, it is "to the Great Banks, and thence direct to Boston." (1st conclusion of law, 2d paragraph, p. 10.) The southern passage — "in the trade-winds" — (1st conclusion of law, 4th paragraph, p. 10) would be along the bottom of Exhibit "C," as the trade-winds begin at latitude 28°–29°. (See chart-direction in lower left-hand corner of Exhibit "C.")

The course of the bark with the days of the month is shown by the irregular thick red line. (Exhibit "C.") The master admits that this is not the "northern" passage, for he said while his vessel was entering the dock at Boston that "he had taken the *middle* passage" (4th Finding, p. 8); and his course is seen at once to be in the middle, — about midway, — between the northern (as we assert it to be) and the southern passages. From the moment of passing Gibraltar he takes a W., or W. by S., course. Upon inspection his passage is seen, at a glance, to be neither northerly nor "direct," but southerly from Gibraltar throughout, averaging three or four hundred miles south of the direct line, and five or six hundred south of the "northern," — a course which prolongs the great difference of climate incident to this difference of latitude throughout a long ocean passage. It was so southerly that the fruit gradually rotted almost entirely away before his eyes as he proceeded, — a fact of which the Court finds that he had ample warning by sight and smell even before he entered the Atlantic. "During the passage from Gibraltar to Boston the master noticed that the cargo was heating badly all the way, and that when about half-way across it commenced to steam, and the steam commenced to escape from the hatches. He noticed, also, a mouldy, musty

smell. This was first noticed some days before he reached Gibraltar. About ten days before he reached Boston flies were noticed in the cargo." (See 8th Finding, 3d paragraph, p. 9.)

Our contention, stated generally, was that as soon as he got out of the Mediterranean so that he was no longer land-bound, the master should have taken a northerly course with this highly perishable cargo, so that the ripening process might be at once arrested, and the fruit preserved, by the sharp cold of the north, and that his failure to do so was a deviation from the course contemplated by the charter-party, and was negligence, — especially in view of the long detention of forty-two days in the Mediterranean. "Shippers of fruit consider it of very great importance for the preservation of the cargo that it be kept in as cold a temperature as possible short of the freezing-point, and have been accustomed for many years to instruct masters to take a northerly course." (3d Finding, pp. 7–8.) "The passage from Gibraltar to the Banks, and thence north of the Gulf Stream, direct to Boston, is quicker, on the average, than the middle passage" (6th Finding, p. 8), — obviously because more direct and avoiding the retarding easterly current of the Gulf Stream (Exhibit "C"), — and is, of course, colder. It is thus doubly safe for the fruit, because it avoids the warm water and climate of a more southern latitude and of the Gulf Stream, as well as the retarding current of the latter, and gets the cold climate and water of a more northern latitude, and the strong westward-flowing counter-current north of the Gulf Stream. (8th Finding, p. 8, and Exhibit "C.")

Instead of taking this passage, — at once a quick and a cold one, and indicated by every natural consideration as the safest for the fruit, — the master takes at the outset, and all the way across, a southerly and correspondingly dangerous course, until about to make the American coast, when he sails north and east four or five hundred miles to port. Though bound for Massachusetts with a highly perishable cargo already somewhat affected or at least unmistakably threatened, he seeks at once a comparatively summer climate likely, indeed, to be comfortable for himself and his crew, but pretty sure to be fatal to our cargo. Without even taking a thermometer with him (8th Finding, 2d paragraph, p. 9), — a

gross neglect, considering the nature of the cargo, — and though the bark was a slow sailer (8th Finding, 2d paragraph, p. 9) and the season late and advancing, — he sails at once almost down to the latitude of the Madeiras, Bermudas, and Savannah, makes substantially his whole passage in the latitude of the Carolinas, and the last thousand miles or more — a third of the entire distance and so late in the season as April — in the warm climate and waters of the southerly edge of the Gulf Stream (see Exhibit "C"), — the worst possible place for the fruit. There its fate was so completely and irrevocably sealed that only thirteen per cent. of it in value reached port. The passage we contend for is in the latitudes and climate of Nova Scotia and New England, and in the winter climate and cold water of the arctic current north of the Gulf Stream, and between the latter and the Newfoundland and Nova Scotia coast. This passage, we claim, was called for by the charter-party according to its natural and obvious import, which, we contended at the trial, was also corroborated by the weight of the commercial and nautical testimony as to its meaning (but the Court expressly declined, as will be seen, to determine the preponderance of the evidence at all; 2d Conclusion, p. 10); and was called for also by due and ordinary care in the custody and transportation of the cargo, irrespective of special contract.

The claimant (appellee) relies for his defence under the charter-party upon an alleged technical or conventional meaning of "northern," by which, as he claims, a vessel may take a course in every sense southerly, even down to the trade-winds, — to wit: "anything north of latitudes 30° to 35° or 36°, or of the southern passage" (1st Conclusion, p. 10), — and contends that the master's course did not constitute actionable negligence. He does not set up *vis major*. There is no allegation in the answer (pp. 4–6), and no finding of fact, based either upon the ship's log or any other evidence, that the master was compelled to deviate by public enemies, fear of capture, stress of weather, pirates, the attempt to save human life, or any other justifying cause recognized by the law, and there is, on the contrary, a general affirmative finding that he could have taken a more northerly course if he had chosen to (5th Finding, p. 8). On the only occasion when he attempts to justify

his course on the ground of *vis major* (April 7) he fails, and the Court expressly finds against him, to wit: that "when he turned towards the south he could have turned toward the north." (8th Finding, p. 8; see April 7 on Exhibit "C.")

THE QUESTIONS OF LAW.

The case, therefore, raises the simple question of law whether the course in fact taken by the master is a compliance with the terms of the contract.

To state our case upon the charter-party, for convenience of reference, in the order and arrangement in which it was stated in our Prayers for Rulings (pp. 9–10), and in the order in which the questions would naturally arise at the trial, our position is this:—

First. — The natural use of language and the circumstances of the case, as shown by the findings of fact and exhibits, show *our* construction of "northern passage" to be the true one, — *prima facie* and in the absence of a usage to the contrary.

Second. — The construction so established will be adopted by the Court unless the claimant (appellee) proves, as a fact, a usage or technical meaning to the contrary, — the burden being upon *him* to prove it by a fair preponderance of the evidence upon that issue, — and no such usage or technical meaning is found by the Circuit Court to have been proved by him.

Third. — The meaning of the disputed phrase should at least be determined as a fact, by the fair preponderance of the evidence, with the burden of proof upon *us*. If, however, the evidence upon that issue of fact is inconclusive, and upon all the circumstances of the case the Court thinks the true meaning of the term is doubtful, the words should be taken most strongly against the claimant (appellee), *fortius contra proferentem.*

These rulings the Court refused to make, and instead thereof stated the conclusions of law as follows (p. 10 of Record): —

CONCLUSIONS OF LAW.

1. The term "northern passage" appears, in view of the testimony of merchants and seamen introduced on both sides, to be a term of art, and is, when taken by itself without the aid of such testimony, unintelligible.

(The gist of this testimony is then stated.)

2. Upon this testimony the Court, thinking that the true meaning of the term is very doubtful, does not consider it material and does not undertake to decide whether a preponderance of the evidence favors one of the above definitions or another, and rules that the claimant is entitled to the least strict definition.

3. The facts found do not show such negligence on the part of the master as to render the owners liable in damages for the injury to the cargo.

It will be seen from the foregoing, and an inspection of the Record, that the Circuit Court has made no finding of fact as to the meaning of the disputed phrase in the charter-party by usage, technically, or otherwise, but has, on the contrary, expressly declined to do so. We are not, therefore, asking for a review of any question of fact, — every finding of fact actually made being entirely satisfactory to us, — nor of any finding as to the weight of evidence, for the Court below declined to pass upon the weight of the evidence on the meaning of "northern passage." The case as reserved brings up simply the question of the interpretation of the contract and the correctness of the Circuit Court's propositions of law on the point. Our complaint is in effect that the Circuit Court has really made no adjudication at all, in accordance with the rules of law, upon the question of the meaning of this contract, whether that question be treated as one of fact, or of law, or of mixed fact and law; that for the Court to say that there appears to be a technical meaning, and then neither find what it is, nor declare the natural meaning, is equivalent either to holding that there is not any technical meaning after all, — in which case, as we have seen, the natural meaning should be declared and adopted, — or to a refusal to find the alleged technical meaning as a fact, which is a failure to exercise the judicial function and is error; and that, if it is to be regarded as a matter of doubt to be solved somehow by the rules of law *ut res magis valeat quam pereat*, the Court below has solved it exactly the wrong way, and should have solved it against the claimant (appellee) instead of in his favor. That is to say, the Court declines, though expressly requested (2d and 3d Prayers for Ruling, p. 9), to weigh the evidence and find the fact even with the burden of proof on the point upon

us; and then, although it has found no fact or usage to make the phrase "a term of art" or establish any "technical meaning," holds that the contract is "unintelligible" and cannot be construed at all in the light of the English language and the circumstances of the case, and decides the case by solving all doubt in favor of the party using the words.

Our position upon the entire case, as it now comes before this Court, may, therefore, be concisely stated in the following: —

SPECIFICATIONS OF ERROR.

I.

Declining to weigh the evidence, and find the fact according to the fair preponderance thereof, when requested to do so, upon the issue of fact as to the meaning of "northern passage." (2d Conclusion, p. 10.)

II.

Ruling that the contract was unintelligible, and could not be construed at all in the light of the surrounding circumstances, without the aid of the expert testimony. (1st Conclusion, p. 10.)

III.

Ruling that — if the meaning was doubtful — the doubt was to be solved in favor of the vessel, and that the claimant was entitled to "the least strict definition." (2d Conclusion, p. 10.)

IV.

Ruling that the master's conduct did not constitute actionable negligence. (3d Conclusion, p. 10.)

POINTS OF LAW, ARGUMENT, AND AUTHORITIES.

A. The meaning of the charter-party.

B. The master's negligence.

A.

THE CHARTER-PARTY.

I.

The refusal to determine the fair preponderance of the evidence.

In construing a written contract the Court has first "to find out the true sense of the written words as the parties used them," and then "to subject the instrument in its operation to the established rules of law."

1 Greenleaf on Evidence, § 277.

The "true sense of the written words" becomes a question of *fact* only upon the suggestion of a "technical" meaning or "trade-acceptation" of them; otherwise it is a question of law.

2 Parsons on Contracts, 7th Edit., * 493, 555–6.
Brown *v.* McGraw, 14 Peters, 479.
Goddard *v.* Foster, 17 Wallace, 123, 142.

Upon that suggestion being made, with an offer of proof and with evidence introduced on both sides, the Court's refusal to determine "the fair preponderance of the evidence" and find the fact in accordance therewith was error, — the fact being "an ultimate and material one," indeed the vital one of the case.

The "Francis Wright," 105 U.S., 381, 387.

"If the Circuit Court neglects or refuses on request to make a finding one way or the other on a question of fact material to the determination of the cause, when evidence has been adduced on the subject, an exception to such refusal . . . . may be considered on appeal. . . . The refusal would be equivalent to a ruling that the fact was not material; . . . and this is a question of law."

The "Francis Wright," *ubi supra.*

The question of fact, as stated by the Circuit Court was, in brief: —

Is the northern passage "anything north of the trade-winds" (lat. 28°), as the appellee claims, or is it "northerly from Gibraltar (lat. 36°) to Boston (lat. 42°)," as the appellants claim? (Record, p. 10, middle.)

Upon this issue we were entitled, as a matter of common right, to have the Court "weigh the evidence in its mind," and thus determine whether "the greater amount of credible evidence" sustained our view or the claimant's.

Haskins *v.* Haskins, 9 Gray, 390, Bigelow, J., p. 393.

Not to weigh competent testimony is as much error as not to admit it. For all practical purposes, it might as well be rejected when offered as not to be judicially weighed after it is put in. Not to weigh it is to abdicate the judicial function. Not to require the judge to weigh it is to place him above the law, and he may then decide cases by simply saying: "*Sic volo, sic jubeo, stet pro ratione voluntas.*" No rule of law as to weighing evidence would stand in his way or control him.

The disputed phrase, of course, has a meaning, — that is conclusively presumed in a contract, — and the Court is to ascertain and declare that meaning. In the event of a conflict of expert opinion, the questions which the Court must answer, and which the parties litigant have a right to have it answer, are: "Which way is the *balance* of sound opinion? Which is the true view according to the *weight* of opinion?" The exact issue of fact is: "What, in the understanding and opinion of the trade, is the true meaning, the true definition, of 'the northern passage?'" for there can only be one true meaning, one true definition.

On an issue of fact of this kind, resting on opinion, there is a special reason for weighing the evidence. It is a commonplace of professional experience that testimony of opinion — expert testimony — is more conflicting and contradictory than any other; that men who would be both truthful and accurate on an ordinary issue of fact depending on sight or hearing will falsify or distort in matters of opinion. This is well recognized. "There is no difficulty in introducing any amount (of expert testimony) on either side." (Mr. Justice Miller, in Middlings Purifier Co. *v.* Christian, 4 Dillon,

488.) In the light of experience it might have been predicted, literally as a matter of course, that, in a case involving a large amount of money to the owners, and to a certain extent the reputation of the master of a vessel, plenty of sea-captains would be found to come into Court and swear to a lax and easy view of "the northern passage." For what purpose is that kind of testimony admitted on one side and the other if not to be weighed? If the fundamental rule as to finding the facts in civil cases according to "the fair preponderance of the evidence" is not applied, what is a trial but an expensive farce? Especially where the question of fact is one as to the meaning of a "technical phrase" or "term of art," as we are now assuming it to be here, so that *ex vi termini* the Court can have no "common" or "judicial" knowledge to throw into the scale, what possible *ratio decidendi* can remain, except sympathy, bias, arbitrary caprice, or lot, if the criterion of the preponderance of the evidence is discarded?

The Court, after "examining the evidence with great care, remembering that its decision of facts is final" (Opinion, p. 13), proceeds to make nine findings of fact (Record, pp. 7–9), covering every point in the entire case which was regarded as material by either party, except this one. It takes pains also expressly to recognize in its opinion the rule of "the preponderance of the evidence" on one sharply contested issue of fact (Opinion, p. 16, top), and finds that fact accordingly (8th Finding, p. 8). As to this particular issue of "the northern passage," the Court says in its opinion (p. 15, near bottom), apparently as its reason for declining to determine the preponderance of the evidence, that "the master might safely adopt either construction without stopping to inquire whether a few more persons believe it to mean the one than those who believe it to mean the other." That is to say, the master's opinion is decisive irrespective of the weight of nautical and commercial authority, and the Court will not revise or question it.

The soundness of this proposition is easily tested. If *the master* is the final judge of the true technical meaning of the language of the contract, let the Court record and apply the master's interpretation, which is that the course he took was "the *middle* passage," not the "northern," and enter judgment accordingly. If the

master is not the final judge, then *the Court* sitting as a jury is such judge, and can rightfully determine it only by the method prescribed by the law for settling facts upon conflicting evidence, to wit: "by the fair preponderance of the evidence," for which purpose the case should be remanded.

With either horn of this dilemma we are perfectly content.

II.

The ruling that the phrase was "unintelligible."

Assuming now, for the purposes of the argument that the Court was not bound to pass upon the issue of fact, and no fact being found as to the meaning of "the northern passage," is the contract "unintelligible" and void, or its meaning doubtful, taken by itself in the light of the surrounding circumstances as shown by the findings of fact and exhibits?

We submit that it is not, and that, on the contrary, its meaning is clear.

a. The question becomes, on the present hypothesis, no longer one of fact but one of law, of judicial interpretation, the expert testimony is to be disregarded as hopelessly contradictory and as failing to show any usage or trade acceptation, and the Court is to proceed to interpret and construe the contract as if the testimony had not been offered on either side, and in the light of all the circumstances and of the established use of language, disregarding the contradictory and inconclusive parol evidence altogether.

Eaton *v.* Smith, 20 Pick., 150.

"The question must then be determined by the effect and legal operation of the words of the contract as they stand in the agreement of the parties. . . . When no new word is used, or when an old word having an established place in the language is not apparently used in any new, technical, or peculiar sense, it is the province of the Court to put a construction upon the written contracts and agreements of parties *according to the established use of language as applied to the subject-matter and modified by the whole instrument or by existing circumstances.* . . . There being then (*i.e.* after throwing out the contradictory parol evidence) no evidence of usage or

other evidence *aliunde* to affect the ordinary meaning of the contract and agreement of the parties, the Court are of opinion that it was the duty of the Court (below) *to put a construction upon the contract*, and that there was nothing to leave to the jury in regard to the meaning and effect of the written agreement," and the jury were accordingly to take "the common and established meaning" of the words from the Court, which then proceeded to construe them.

Shaw, C.J., in Eaton *v.* Smith, *ubi supra*.

"In the absence of evidence sufficient to show that a technical meaning has been attached to the words 'no St. Lawrence' (in a marine policy containing the stipulation 'warranted no St. Lawrence between Oct. 1 and Apr. 1'), — or it is probably more accurate to say in consequence of its being established by the evidence that the words have no technical meaning, — it becomes *necessary for the Court to construe them*."

Birrell *v.* Dyer, 9 App. Cases (H. of L.), 353.

The Court's failure to deal with the contract in this way, and declare its meaning, is error. The expert testimony must either be weighed and passed upon, and the result of it declared as a fact, or it must be disregarded altogether and the language judicially construed; no other course is possible unless a contract whose intent and purpose are obvious and undisputed and whose language is plain is to be set aside as "unintelligible" and void, and the parties to it left remediless.

Thus in Eaton *v.* Smith, *ubi supra*, the question was what the phrase "to operate on land" meant when used in reference to timber lands in Maine. Expert testimony was introduced to show that by usage it meant only for *the owner of the land* to cut the timber on it at his own expense; and this was met by expert testimony that it included also selling growing timber to be cut by *the purchaser* according to its natural import. The expert testimony as to the meaning of the phrase in Maine being thus contradictory and apparently *in equilibrio*, the Court below — Mr. Justice Wilde — ruled it all out after it had been put in, directed the jury to disregard it, and proceeded to construe the words himself according to their natural

import, and was sustained by the full bench, Chief Justice Shaw using in the opinion the language which we have quoted above.

On these sound principles of law the Circuit Court should have dealt with this contract as follows, assuming, as we are now doing for the purposes of the argument, that the Court was not bound to weigh the evidence, or that the contradictory evidence was *in equilibrio:* —

The evidence tending to show that the phrase "the northern passage" is a term of art, with an accepted technical meaning distinct from its natural one, fails to make out that proposition, being contradictory. The term is, therefore, not a term of art at all, as it at first appeared to be, and the Court is accordingly to construe it according to the established use of language and the known use of the words as a part of the English tongue, and the contract shall, therefore, be taken to mean, literally, "take a northerly passage," "sail a northwardly or northerly course from Gibraltar:" and as the master did not do this the owners are liable.

We submit, therefore, that if no usage appeared it followed that the phrase was not "a term of art," and it became the duty of the Court, instead of declaring the contract unintelligible, to proceed to construe it in the light of "the subject-matter, and surrounding circumstances," and in the most sensible manner.

Mobile & M.R. Co. *v.* Jurey, 111 U.S. 584, 592, and cases cited.

Birrell *v.* Dyer, *ubi supra.*

What, then, did these parties mean in this contract? What is the natural sense of their language? What idea does it convey to the mind? What was their intent and purpose, and how would it best and most surely be accomplished?

These questions, which the Court below did not answer and apparently did not think it material or pertinent to consider, are now before this Court for determination, — upon our present hypothesis that the Circuit Court was not bound to determine the fact.

b. What did the parties mean, then, by "proceed direct to Boston" and "take the northern passage"?

Did they mean "sail anywhere you please in the warm or mild

latitudes, provided you keep north of the easterly trade-winds" (winds which would quicken the passage and so diminish the danger to the cargo!) or "sail northwardly to Boston," — for that is the simple alternative? (See 1st Conclusion, 2d and 3d paragraphs, p. 10.)

Can there be any serious doubt which they meant? Can common sense give but one answer? Is not the mere statement of the question a *reductio ad absurdum* of the claimant's (appellee's) answer to it?

To examine the subject in detail: —

First. — What is the natural sense and import of the language: "Proceed direct to Boston" by "the northern passage"?

The words are all plain, common, English words, suggesting no ambiguity or difficulty whatever on their face, with no inherent "technical" or "artificial" character, and perfectly intelligible in a reasonable and obvious way upon a glance at the chart (Exhibit "C").

"Direct" means straight, "the straight and shortest course" (Abbott on Shipping, 12th edition, 306) from Gibraltar to Boston. The latter is shown by the fine red line (Exhibit "C"), according to Mercator's projection; the "great circle track" (see Exhibit "C") represents with geographical accuracy "the straight and shortest course" on the earth's surface, — the rhumb line. Even if the contract stopped here, — or if the phrase "northern passage" were to drop out of the contract as unintelligible and void, — our case would be made out.

But the contract does not stop here. Something more is required of the vessel in the interest of the cargo. The subsequent phrase was expressly written into the printed blank for a purpose, and that purpose evidently was to insure to the fruit an even colder, a more northerly passage than "direct" alone would call for, to strengthen the contract in behalf of the shippers.

"Northern" means, of course, northward or northerly.

A "passage" is the actual or supposed course of a vessel, its "passing" or transit across the ocean, a real or imaginary line upon the earth's surface.

"The" would naturally indicate a usage; but as on our present hypothesis there is no usage distinct from the natural meaning of the words, the definite article can simply indicate the definite understanding and agreement of the parties themselves as to the course to be sailed. It certainly cannot make "northern" any *less* northerly than the indefinite article "a" would, and it would, therefore, be sufficiently favorable to the claimant at least to consider the contract in the absence of a usage as if it read "Captain engages himself to take *a* northern passage."

Placing one's self then at Gibraltar, in the same latitude with Albermarle Sound, North Carolina, and facing across the Atlantic towards Boston (6° or 7°, or about 500 miles, farther north), with the chart (Exhibit "C") before one, the "northern" passage or course can mean but one thing. It means "up," as southern means "down," and middle means "between," — where the "John H. Pearson" went in this case (see Exhibit "C"). "The northern" naturally corresponds on the north to what "the southern" is on the south. The southern passage is described by its distinguishing feature, the easterly trade-winds; to describe the northern by a like convenient landmark, it is "north of the Azores" or Western Islands, which happen to lie exactly upon the "direct" course. It is in this way that it is described in the regular stereotyped form of blank as set forth in the Opinion (p. 14, top), and in the "Maria Luigia" (18 Fed. Rep., 556, and 28 Fed. Rep., 244, 245), to wit: "Being essentially necessary for the good preservation of the cargo, it is especially agreed that the vessel, on leaving Gibraltar, shall go to the northward of the Western Islands, and keep north of that latitude unless absolutely forced south by stress of weather; in which case the vessel's log-book shall furnish evidence of that fact."

Throughout the opinion of Judge Benedict in that case, in the District Court, this exact phrase "*the northern passage*" is repeatedly used to designate the course prescribed in that charter-party as above set forth. Thus he states the question to be whether the master was forced by stress of weather "to abandon *the northern passage*, as he did on that day"; whether "an easterly current forced the master to abandon *the northern passage* in order to escape

the peril," etc.; "when the ship abandoned *the northern* for the southern passage," etc.; using also, as descriptive of the same, the expressions, "the northerly passage," "the northwardly course," and "the northern course" (see 18 Fed. Rep., pp. 557–9); and Mr. Justice Blatchford, in the Circuit Court, uses the same phrase in the same sense in the first paragraph of his opinion in the case upon appeal (see 28 Fed. Rep., 247). There was no question of usage or "term of art," and no evidence on the subject, in that case; but both the Circuit and District Courts used the phrase "the northern passage," naturally and as a matter of course, in the sense in which we claim it was used in our charter-party. That case was disposed of against the libellant by the fact, found by the Circuit Court, that the master was driven south by stress of weather.

This judicial use of the phrase in the exact sense which we claim for it shows — if any judicial exposition and use of the language were necessary — that it is the apt and appropriate one to designate the course which we contend for, and that it is not the natural one to designate the passage contended for by the claimant. It also shows either that the phrase is not a "technical" one or "term of art," but merely a common English phrase to be interpreted according to the natural and obvious signification of its words upon an inspection of the Atlantic chart by the application of common sense and a knowledge of the vernacular; or that, if it is properly to be called "a term of art," its meaning as such appears to be familiar to Mr. Justice Blatchford and Judge Benedict representing many years of judicial experience in the Federal district containing the principal Atlantic port of the United States, and is used by them naturally and spontaneously. This is no strained construction, but simply "a northerly course" which masters with fruit-cargoes have been habitually instructed for many years to take. (3d Finding, 1st paragraph, pp. 7–8.)

On the other hand, the construction contended for by the appellees violates the natural meaning of the word "passage," as well as of the word "northern," by making it cover a vast ocean belt or area of 14° or 15° of latitude from the trade-winds (latitude 28°) northward, while ours indicates a definite, precise, and intelligible course, — a "passage" in the true sense.

The particular printed blank on which the Palermo ship-brokers wrote this contract did not happen to contain the full printed clause (as in the "Maria Luigia" case), so it was written in *in short*, as is natural with business-men. "Although it is true that the Court ought not to make a contract for the parties which they have not made themselves, yet a mercantile contract, which is usually expressed shortly, and leaves much to be understood, ought to be construed fairly and liberally for the purpose of carrying out the object of the parties."

The "Teutonia," L.R. 4 P.C., 171, 182.

As the phrase was, in our case, written into a printed blank for the benefit of the cargo (1st Finding, p. 7), the parties must have meant to require of the master at least as northerly a passage and as much protection to the fruit, as in the case of the printed stipulation in the charter of the "Maria Luigia" (*ubi supra*), rather than to allow a southerly course and less protection to the cargo. It is significant that the master, at least, evidently had no difficulty in understanding it so. (4th Finding, p. 8.)

Second. — How was the object contemplated by the parties to be most naturally and surely attained?

The object was to keep the fruit as cold, and consequently as far north, as possible.

"Shippers of fruit consider it of very great importance for the preservation of the cargo that it be kept in as cold a temperature as possible short of the freezing point, and have been accustomed for many years to instruct masters to take a northerly course." (3d Finding, pp. 7–8.)

Natural conditions would seem to lay out and clearly indicate the way to make as sure as possible of attaining this object, viz.: by passing to the northward of the Gulf Stream, with its warm climate and water and strong easterly current, which continue very pronounced as far east from the American coast as long. 45° to 50° W. (7th Finding, p. 8, and Exhibit "C"), and which not only keep the fruit warm but retard the vessel and aggravate the exposure of the cargo by lengthening the voyage. By doing so the vessel, besides getting a colder climate from the start, gets also the additional advantage,

westward of long. 45° to 50° (see Exhibit "C"), or for more than a third of the voyage, of a strong and cold westward-flowing current, which is found there (7th Finding, p. 8), which keeps the fruit colder and hastens the vessel on her trip. This passage is also, in fact, quicker, on the average, than the middle passage (6th Finding, p. 8), as would naturally be expected, and avoids "the stormy region of the Gulf Stream" in about long. 50° (7th Finding, 2d paragraph, p. 8), with its probable delays, where the "John H. Pearson" was in fact delayed an entire fortnight, — from March 23d to April 7th. (See Exhibit "C" and 8th Finding, 2d paragraph, pp. 8–9.)

Our interpretation of "northern passage" meets all these natural requirements (see upper red line, Exhibit "C"); that of the claimant ignores and defeats them all; and mercantile contracts, especially charter-parties, will be liberally interpreted with a view to accomplishing what the parties meant to accomplish.

Hart *v.* Shaw, 1 Cliff., 358, 363, 366.

The parties evidently meant that the fruit should come by the safest route and leave the minimum to chance, not merely by a route which might sometimes be safe, or on which the chances of safe transportation would be simply pretty good. Without any stipulation at all for the express benefit of the cargo, the master would have been bound to take a reasonably safe course, at least, if not the safest; with one, he was naturally called upon to take the very safest, one really "northern." The stipulation is inserted *ex abundanti cautela* to insure the quickest and coldest passage. To hold that, under an expression requested by us and granted by the claimant in the interest of safety to the cargo, the parties meant to allow the cargo to be taken down into the region of the very greatest danger, to wit, — to those warm latitudes and waters north of the trade-winds, which do not even have the benefit of the steady easterly wind and quick passage of the "trades," — in other words, the longest and hottest passage, — is to stultify the parties; to say that "northern" may mean southerly — "anywhere north of 30° to 35° or 36°, or of the trade-winds," — is to fly in the face of the plain and unambiguous language the parties have used. Such a course only a

well-established usage as to the meaning of the phrase can justify, and no such usage is found.

Third. — How did the parties themselves, in fact, understand their contract?

On this point the master's statement to a news-agent *ante litem motam*, and while the vessel was entering the dock in Boston, that he had taken "*the middle passage*," leaves no room for doubt.

It is the most direct possible evidence, given by the most authoritative witness possible, strongly against interest, and under circumstances as favorable to its credibility as they could possibly be, and there is not a *scintilla* to the contrary.

If the owners or their agents at Palermo had ever given an intimation — and they would certainly have given it to the master if to anybody — that the northern passage was, or that they thought it was, what they now *post litem motam* claim it to be, he would not have called his course *the middle passage*. He would have called it the northern passage. Whatever anybody else might understand by the phrase, there is no doubt how the actual parties to the contract understood it.

The Circuit Court says in its opinion (p. 15, bottom), that the admission of the master is only to be taken "like any other piece of evidence tending to show the meaning of the technical phrase." In one aspect, undoubtedly, the master's statement is only the expert opinion of one seaman, and if the Court is to go on (as we claimed it should) and weigh the evidence, and find as a fact what the alleged technical meaning of the phrase is, it would not become necessary, perhaps, to look at it in any other aspect, as the technical meaning so found would be, *prima facie* at least, the one to be adopted by the Court. But if, as the Circuit Court has ruled, the Court is *not* to weigh the evidence, and find the fact according to the fair preponderance (2d Conclusion of Law, p. 10), and the case is, therefore, one of legal and judicial construction of written words, the master's admission, uncontradicted, uncontrolled, and unexplained as it is, becomes a circumstance of the utmost importance and practically conclusive. Taken in this aspect, it is the strongest possible admission of the claimant's agent and representative — intrusted by his principal

with the transportation of our cargo — as to the meaning of the charter-party under which he is acting as understood by the parties themselves. It makes, either with or without the other circumstances set forth in the findings of fact, a *prima facie* case for the libellants.

The "Potomac," 8 Wallace, 590, 594.

And as the claimant has not met it with proof establishing a usage to the contrary, it makes out the libellant's case.

In view of the foregoing considerations and circumstances, let us take the question which the Circuit Court asks (Opinion, p. 15, near top), but does not answer: "If the parties had defined 'the northern passage,' who can say whether they would have defined it as the claimant does or as the libellants do?" and ask if there is really any serious doubt — even assuming every burden to be upon us to make the meaning clear — as to how they would have defined it? Can there be any doubt that they would simply have taken the other kind of a blank charter-party specially prepared for fruit cargoes, with the clause inserted in full, as in that of the "Maria Luigia," and have filled it out with names, dates, freight, etc.? The significant fact remains, however, that they did *not* write out a full definition of the phrase, presumably for the simple reason that there was no need of doing so because it defined itself, and they and the master understood it without further definition.

III.

If the meaning is doubtful how is the doubt to be solved?

Assuming now that the foregoing considerations do not lead to the result we contend for upon the facts and exhibits, that the meaning of the contract is uncertain, and that the parol evidence is *in equilibrio* and inconclusive, leaving "the true meaning" of the phrase, in the opinion of the Court, "very doubtful" (2d Conclusion of Law, p. 10), how is that doubt to be solved under the rules of law? If the contract is equivocal, and equally capable of either interpretation, will the Court solve the doubt against the libellants or against the claimant? against the party who originally suggested

the stipulation and the words, or against the party who makes the stipulation and uses the words in the executed contract?

Which side is bound at its peril to remove the doubt from the mind of the Court? Which is entitled to the benefit of the doubt, the party who makes the stipulation and is to perform it, or the party for whose benefit it was entered into and is to be performed?

Shall the words receive a lax construction or a strict one? and is the promisor entitled to "the least strict definition?" (2d Conclusion, p. 10). Which way will the Court turn the poised balance, — in favor of the vessel which was to protect, or of the cargo that was be protected?

Will the Court lean towards a narrow construction of "northern," that will relax the obligation almost indefinitely, and practically destroy the value of the promise, or towards a broad and liberal one, in accordance with the spirit and purpose of the promise?

Which is the fair, just, equitable solution of the doubt? for "the construction in all cases of doubt should be such as to dispense remedial justice" (2 Wharton on Contracts, § 672); and "the contract should be supported rather than defeated."

2 Pars. Cont., 635.

The exact ruling of the Circuit Court on this point is that as "the true meaning of the term is very doubtful . . . the claimant is entitled to the *least strict* definition;" a ruling which, we submit, so far from dispensing "remedial justice," deprives the libellants (appellants) of it altogether.

On this point the legal question is either one of the "burden of proof" or of "the solution of a doubt" in the interpretation of a written instrument. It is not entirely clear, from the opinion of the Circuit Court, in which way the learned Judge below regarded it, as his language would seem to point sometimes to the one, sometimes to the other, view. He apparently, however, viewed it rather in the latter way, for he in terms lays down in his opinion the proposition that "the burden of proof is of very little importance in most cases and of almost none in the construction of a written contract." But as the opinion goes on to state that in a certain sense "the burden is on the shippers," and as the two views run

into each other somewhat, we will proceed to consider the question from both points of view, believing that, looked at in either way, the Court's ruling was error.

First. — The burden of proof.

The issue of fact as to the meaning of the term "the northern passage" in the trade is a special one incidental to the interpretation of a written contract, and one which the Court is to pass upon before it can decide whether there has been a breach of the contract.

Bowes *v.* Shand, 2 L.R. App. Cas., 455.

Prima facie, the words have the sense we claim for them, and on well-settled principles of law the burden of proof is upon the claimant to establish as a fact a different signification by usage.

Citizens' Bank *v.* Nantucket Steamboat Co., 2 Story, 16.
The Falcon, 3 Blatch., C.C., 64, 66.
Treadwell *v.* Joseph, 1 Sumn., 390.
The ship Fortitude, 3 Sumn., 228, 257.
The Rhode Island, Olcott, 512.
Bowes *v.* Shand, 2 L.R. App. Cas., 455.

"Words are to be understood in their plain, ordinary, and popular sense, unless they have, in respect to the subject-matter, as by the known usage of trade or the like, acquired a particular sense distinct from the popular sense of the same words."

Lord Ellenborough, in Robertson *v.* French, 4 East. 130, 135–6.
Houghton *v.* Watertown Ins. Co., 131 Mass., 301, 302.
Brown *v.* Brown, 8 Met., 573, 576.

"If the contract bears a plain natural sense and meaning nothing should make us deviate from that plain natural sense and meaning but the strongest evidence, not of the opinion of this or that witness but of a custom of the trade or business which forms the subject-matter of the contract, which has given an unusual and . . . a non-natural meaning to the contract."

Lord Hatherly, in Bowes *v.* Shand, 2 L.R. App. cases, 455, 473.

Upon the suggestion and offer of proof that the phrase has a known and accepted meaning in the trade, distinct and different from its natural one, by a commercial or nautical usage, — to wit: "Anywhere north of lat. 30° to 35° or 36°, or of the trade-winds" (lat. 28°), the issue thus raised is a special issue of fact, with the burden of proof necessarily upon the party setting up the alleged technical meaning, — in this case the claimant.

The burden of proof to establish a usage is upon him who asserts it, whether plaintiff or defendant.

Lawson on Usages, 97, § 52.
Newall *v.* Royal Exchange Shipping Co., 33 W. R. 868, Court of Appeals.

"The *onus probandi* . . . depends upon the position of the affair as it stands upon the undisputed facts."

Railway Co. *v.* Gladmon, 15 Wall., 401, 407,
quoting from Denio, C.J., in Oldfield *v.* N.Y. & H. Railroad Co., 3 E. D. Smith, 103.

Upon "the undisputed facts" alone of this case, *i.e.*, the findings of facts and exhibits, the meaning claimed by us must prevail, and the burden of proof is upon the claimant (appellee) when parol evidence is offered to establish another.

Best on Evid., §§ 268 *et seq.*
Baker *v.* Batt, 2 Moo. P.C., 317, 319.
Amos *v.* Hughes, 1 Moo. & R., 464.
Huckman *v.* Fernie, 3 M. & W., 505.
Mills *v.* Barber, 1 M. & W., 425.

"As the question of the burden of proof may present itself at any moment during the trial, the test ought, in strict accuracy, to be expressed thus: Which party would be successful if no evidence, or no more evidence, as the case may be, were given?"

Best on Evidence, § 268.
Alderson B., in Amos *v.* Hughes, 1 Moo. & Ry., 464.

The burden of proof being upon the party setting up the un-

usual, artificial, or conventional meaning to establish it, if the evidence is *in equilibrio* the words should receive their strict, natural, and literal sense, — "the strict, plain, and common meaning of the words."

1 Addison on Contracts, 296.
Tindal, C.J., in Shore *v.* Wilson, 9 Cl. and Finn., 565–6, 1 W., Bl. 60.

The party setting up that "direct" or "northern," from a point in latitude 36° to one in latitude 42°, means southerly, or "anywhere north of 30° to 35° or 36°, or of the trade-winds," must have the burden of proof upon him to establish it. We are not called upon to establish any meaning different from the natural and obvious one, and we introduced parol evidence in support of the latter only for the purpose of rebutting that offered by the claimant to establish the alleged "technical" meaning and incidentally of corroborating and fortifying the natural sense of the words.

The fact that we "had caused it to be put into the charter-party" (Opinion, p. 14, 3d paragraph) is not a valid reason for placing the burden on us to prove as a fact the meaning of the clause. The burden of proof is determined entirely by the position of affairs at the trial upon the executed contract as it is then and there presented, irrespective of what took place at or before its execution or at any other time.

The Court says again (p. 15, near bottom): "If the contract contained a technical phrase subjecting the master to an unusual duty, that phrase must be made clear by evidence, or else that part of the contract is unintelligible. . . . In this sense the burden is on the shippers." We have already submitted (*ante*, pp. 10-13) that the only way known to courts of law for determining in civil cases whether a thing is or is not "made clear by evidence" is weighing the evidence and determining the fair preponderance, which the Circuit Court declined to do. Also (*ante*, pp. 13-22) that the contract is not "unintelligible" without the aid of the parol evidence. If we have sustained these propositions, it remains for us only to point out that a phrase cannot be taken to be a "technical" one when no usage

is found. It is a contradiction in terms to speak of a "technical" phrase imposing an "unusual" duty. The very essence and definition of a technical term is that it is established by *usage*, and the duty described by it cannot *ex vi termini* be "unusual." If that duty *is* "unusual," then the phrase in question is not "a term of art" at all; and the Court will get at the intent of the parties by legal construction, and no question of fact — and consequently no question of burden of proof — arises at all. If the phrase is a "technical" one, then either the evidence of its meaning must be weighed and the meaning found as a fact accordingly; or, if that is not to be done, then the findings of fact must be searched for the "usual" meaning; and on doing so it appears that for many years masters have been instructed to take "a northerly course" (3d Finding, p. 8, top); and as to what a "northerly course" is there can hardly be two opinions.

While the Court declares that the "burden of proof is of very little consequence" (which is certainly a somewhat startling proposition of law, in view of the mass of controversy and decision upon the subject and the number of close cases that practically turn entirely upon the burden of proof), it proceeds apparently to put upon us not only the ordinary burden (which upon this issue we claim to be error) but apparently the burden of proving *beyond a reasonable doubt*, as in the criminal law, — for it expressly rejects the rule of "the preponderance of the evidence," — or else of having *all* the evidence on our side and none against us.

By whom must the phrase "be made clear by evidence"? Evidently by the owners who use it, and the burden therefore is not upon the shippers; and if the alleged "technical phrase" is *not* "made clear by evidence," then it proves to be no technical phrase at all, but simply untechnical language to be interpreted in the light of the surrounding circumstances.

By whom are the master, or his employers the owners, "subjected" to any duty "unusual" or otherwise? Clearly by themselves alone, and solely by their own voluntary act in entering into the contract.

it happened, — proved clearly by usage that it meant the latter, and that the burden was upon them to prove it, *i.e.*, upon the party setting up the unnatural or conventional meaning against the natural and *prima facie* meaning.

There is the additional feature in that case, that the defendant, who relied upon the natural meaning, of his own motion went forward at the trial and offered proof of usage in support of that meaning, as we were obliged to do under the ruling of the Court below in this case; but the Court said that this was unnecessary, and that the defendant had, in doing so, taken upon himself an *onus* that did not belong to him.

A word is proper as to the case of Funcheon *v.* Harvey, 119 Mass., 469, the purpose for which we cited it below, and the Circuit Court's comments thereon in its opinion (p. 15).

That case is an authority for the proposition that when a cargo is destroyed by decay the burden of proof is upon the master to show that he came by "the direct and usual" route stipulated for in his charter-party. It happened to be an action to recover the freight money, in which, naturally, the master was plaintiff; but it is obvious that the fact that he happened to be plaintiff suing for freight, instead of defendant sued for the damage to the cargo, was not the *ratio decidendi*, and that, if there had also been a cross-action against him as defendant for damages, the burden would have been upon him in that action also "to prove that he had performed that stipulation, as well as all other stipulations of the charter-party" (119 Mass., 472); otherwise the Court would have been involved in the absurdity of having the burden on different persons upon the same issue in two cases between the same parties, growing out of the same transaction, and tried together. It does not, therefore, "follow, by parity of reasoning" (Opinion, p. 15), from that case, that the cross-libels in this case would have to be decided opposite ways. On the contrary, that case would ensure perfect consistency in the decision of these two cross-libels, if the issue under consideration were involved in them both, by placing the burden in each upon the master (*i.e.*, the owners of the bark), "to prove that he had performed that stipulation, as well as all other stipulations of the charter-party" (119 Mass., 472), — that the southerly passage he took was "the

northern passage," - - irrespective of his being plaintiff or defendant. The answer, in this case, alleges that "said master complied fully with the stipulations of the charter-party in this and every other respect" (p. 5, middle), as the declaration did in Funcheon *v.* Harvey, *ubi supra*.

We do not — and did not below — rely particularly upon Funcheon *v.* Harvey, or lay any stress upon it as very much in point, — no question having arisen in it as to the interpretation of a contract or of a phrase in one; but so far as it goes, it is, we submit, notwithstanding the comments of the Circuit Court, an authority that the burden is upon the claimant to show that the passage he took was the passage called for by the charter-party, — the cargo having been delivered in bad order from decay, — especially when *prima facie* at least the charter was not complied with according to its natural tenor and sense upon the master's own admission.

In fact, moreover, the same issue does not really arise in this libel and the cross-libel for freight. We admit our liability for freight, — the cargo having been delivered *in specie*, though almost worthless, — and do not seek to defeat the cross-libel on the ground of non-performance of the stipulation in the charter-party. We only claim to recoup and set off the damages, and as the damages will, upon assessment, evidently far exceed the freight, the latter will be a deduction, which the ship-owners will be entitled to have made from the damages they have to pay us; if the damages prove to be less than the freight, they are to go in reduction of the freight we are to pay.

Souter *v.* Baymore, 7 Barr, 415.
1 Pars. Shipp. and Adm., 206, n. 2.

On that ground the cross-libel now awaits in the Circuit Court the final disposition of the principal libel.

To illustrate our position on the burden of proof, take the question as it actually arises at the trial. The execution of the charter and bill of lading is proved; the actual course of the vessel is proved. The Court has then to interpret the written contract and decide whether that course is "direct" and is "the northern passage," in order to determine which way to enter judgment. To do

so, it asks itself: "What is 'direct,' and what is 'the northern passage?'" To this it would answer: "*Prima facie* 'direct' is straight; *prima facie* 'the northern passage' is at least as northwardly as 'direct,'— naturally it would be more so, and it would seem to be added to 'direct' for that purpose. If nothing appears to the contrary, judgment must be entered accordingly for the libellants. The claimant, however, offers to prove the contrary by usage. On this issue the claimant has the affirmative, and must lose if he does not make out his usage. The burden of proof is, therefore, upon him." When this issue of fact is settled, the Court construes the contract accordingly.

It follows from our view of the burden of proof that if the evidence when weighed by the Circuit Court is found to be fairly *in equilibrio* on the alleged trade-acceptation of the phrase "the northern passage," judgment should be against the claimant.

Second. — The legal "solution of a doubt."

Coming now to the second method of treating the Court's ruling, we submit that the ruling is equally erroneous from this point of view. Assuming that the meaning of the words is doubtful, — that they are equivocal, and equally capable of meaning either "north of the direct line" or "north of the trade-winds," — then by the familiar rule they should be taken most strongly against the party using them, *fortius contra proferentem.*

Garrison *v.* United States, 7 Wall., 688.
Noonan *v.* Bradley, 9 Wall., 394.
McConnel *v.* Murphy, L.R. 5, Priv. C., 219.
Barney *v.* Newcomb, 9 Cush., 56.
National Bank *v.* Ins. Co., 95 U.S., 678.
Moulor *v.* Amer. Life Ins. Co., 111 U.S., 335, 342–3.
Crane *v.* Hyde Park, 135 Mass., 147, 149.
Ins. Co. v. Wright, 1 Wall. 456, 468.

"Where a stipulation is capable of two meanings equally consistent with the language employed, that shall be taken which is most against the stipulator."

McConnel *v.* Murphy, L.R. 5, P.C., 219.

The Circuit Court's ruling that the claimant is entitled to "the

least strict" interpretation, or, as expressed in the opinion, that the master "might adopt either" with impunity, is in direct contravention of this well-settled canon of interpretation, — a rule "drawn out of the depths of reason." (Bacon's Max. Reg. 3.) "The reason of the rule 'contra proferentem' is that men may be supposed to take care of themselves; and that he who gives, and chooses the word by which he gives, ought to be held to a strict interpretation rather than he who only accepts." (2 Pars. Cont., 7th edition, *507.)

It is well settled that the rule applies as much to the stipulations of the respective parties in an indenture as in case of a deed poll. 2 Parsons on Contracts (7th Edit.) 507.

Browning *v.* Wright, 2 Bosanquet & Puller, 13, 22.
Earl of Shrewsbury *v.* Gould, 2 B. and Ald., 487, 494.
Barton *v.* Fitzgerald, 15 East., 530, 546.

The "party using the words" — *proferentem* — is the promisor, the party who speaks through them in the contract, — in this case the claimant. It is he who promises that the vessel shall "proceed direct to Boston," and "take the northern passage," and it is, therefore, he who utters or "uses" the words in the instrument which is before the Court. (See cases last above cited.)

Palmer *v.* Warren Ins. Co., 1 Story, 360.
Donnell *v.* Columbia Ins. Co., 2 Sumn., 366.
West Ins. Co. *v.* Cropper, 32 Penn. St., 351.
Audley *v.* Duff, 2 Bos. & Pull., 111.
Blackett *v.* Royal Exch. Assur. Co., 2 C. & J., 244, 251.
Fowkes *v.* Assur. Assoc., 3 B. & S., 917, 929.
Crane *v.* Hyde Park, 135 Mass.
Wetmore *v.* Pattison, 45 Mich., 439, 441.

Carver's Carriage of Goods by Sea,

This rule extends to separate parts of a contract taken each by itself. Thus in Wetmore *v.* Pattison: —

"*This portion* of the contract is the *agreement of the plaintiffs*, and its obscurity justifies an interpretation most strongly against them."

Wetmore *v.* Pattison, 45 Mich., 439, 441.

If the circuit judge meant to apply the familiar rule, but held (as he appears to have done) that we are "the party using the words" or "*proferentes*" because we originally suggested them, and they were introduced for our benefit and protection, he misapplies it, and his ruling is error. The rule is to be applied to the contract as it stands embodied in the executed instrument before the Court, irrespective of the antecedent negotiations of the parties. (See cases cited *supra*, pp. 30–1.)

"When terms are doubtful or ambiguous they are to be taken most strongly against *the person engaging*."

Metcalf on Contracts, 312.

The words, "Captain engages himself to take the northern passage," are just as much the words of the claimant as if they had constituted a separate unilateral contract or deed-poll signed and to be performed wholly by the claimant alone, instead of appearing in an indenture which contains stipulations by the libellants also. The two parties are to be regarded as orally reciting their respective stipulations before the Court, literally "using" the words. Thus the claimant says: "The vessel shall proceed direct to Boston, and take the northern passage;" we say, "We will pay freight in the lump sum of sixteen hundred and fifty U.S. dollars in full," and so on throughout. If any doubt arose as to our stipulation for freight, — as to what "U.S. dollars" meant, for instance, — can there be any question that the doubt would be solved against us? Would the fact that the stipulation was originally suggested by the claimant, as it probably was, and was put in for his benefit, as it of course was, be any reason for taking the words most strongly against *him?* From the nature of things each party's stipulations in a contract are always suggested by, and for the benefit of, the other. It is precisely with a view to getting the other party to "use" the words, and then of holding him to the performance of them, that each party suggests the stipulations that the other is to make. The other party cannot be *compelled* to use the words. If he could there might be some color for solving doubts in his favor instead of against him; but the very essence of a contract is that each party adopts the words used voluntarily if at all. Duress avoids the contract. We could not

"*cause* the clause to be put into the charter-party" (see Opinion, p. 14, two-thirds down) against the will of the claimant. We suggest and request, the claimant acquiesces and stipulates; accordingly he thereby makes the words his own thenceforth and from the moment the contract is signed. Why should they not be taken most strongly against him, if there is doubt about their meaning? It is both common sense and well-settled law that they should be.

This exact point was considered and passed upon in Audley *v.* Duff (*ubi supra*), a suit upon a contract of insurance to recover back a premium. The Court says: "It is true that the policy is made out by the broker of the assured, but the undertaking (in the policy) to return the premium is the undertaking of the underwriters, and must therefore be construed most strongly against them."

Some confusion has been brought into this subject by occasional expressions *obiter* in the books about construing doubtful words most strongly "against the party for whose benefit they are introduced," but it will be found that in each such instance the words are in fact construed against the party using them in the instrument, and the language of the Court is explained by the fact that the party using the words in the instrument happens also in each case to be the party for whose benefit they are introduced, and who undoubtedly originally suggested them, as in the case of limiting or excepting clauses. The real *ratio decidendi* in them all is the rule *fortius contra proferentem* as above defined.

Thus the two following cases will serve as illustrations; in one of them the doubtful words were construed *against*, in the other *in favor of* the party *for whose benefit and at whose suggestion* they were introduced, but in both cases *against the party using them*, — *contra proferentem:* —

In Blackett *v.* Royal Exch. Assur. Co. (*ubi supra*) the doubtful clause "free from average under £3 per cent." was introduced for the benefit and at the instance of *the underwriter*, and the doubt was whether it applied where there was a series of partial losses, each less than, but together exceeding, £3 per cent. They were clearly the words of the *underwriter* in the policy and part of his undertaking, though a qualifying or excepting part. The doubt was solved against him,

contra proferentem; i.e., it was held that each loss must amount to £3 per cent., though the Court mentions *obiter* among its reasons the incidental fact that they were introduced for his benefit. The same is true of all the cases of *exceptions*, which are always in the instrument the words of the party for whose benefit they are introduced.

In Audley *v.* Duff (*ubi supra*), on the other hand, the clause was that the underwriter was "to return £6 per cent. (of the premium) if she sail with convoy from the coast of Portugal," etc.; a contingency about the meaning of which there was doubt. The clause was in this case one introduced for the benefit of *the assured*, and at his instance, but it was the language of *the underwriter* in the contract. The Court solved the doubt against the underwriter, *contra proferentem*, and *in favor of* the party for whose benefit it was introduced.

The recent case of Birrell *v.* Dyer, 9 App. Cases (House of Lords), 345, illustrates this point exactly. This was an action on a time policy of marine insurance in which the assured warranted that the vessel should not enter the St. Lawrence between October 1 and April 1, the words being: "Warranted no St. Lawrence between October 1st and April 1st." The vessel entered the *gulf*, but not the *river*, St. Lawrence between those dates, and the question was whether that was a breach, *i.e.*, whether "St. Lawrence" meant the river alone, or the river and gulf. Both sides introduced evidence of mercantile usage, but neither proved one, and the meaning was left in doubt. The Court solved the doubt against the assured (the warrantors, or *proferentes*), and *in favor* of the party for whose benefit, and at whose instance undoubtedly, the words were introduced, viz., the underwriters, and held that the words included the gulf, as their fair natural import would indicate, and that the Court must solve all doubt by leaning as far as possible in the direction of avoiding the peril which the parties to the policy intended should be avoided. The parties using the words — the stipulators — were thus held to the strictest interpretation of the words and the one most against themselves. While some of the judges, in giving their reasons for the decision, disclaim an intention to apply the rule *contra proferentem*, and fall into some of the confusion above spoken of as to which

party is the "*proferentem*," it is obvious that the real *ratio decidendi* is that the doubt is to be solved against the party making the warranty in question viz., the assured, and in favor of the party for whose benefit and protection it is made, viz., the underwriter. "It is in form a warranty by them (the assured) that their vessel will not be navigated in certain waters, a matter which it was entirely within their power to regulate. These considerations point to the respondents (the assured) themselves being the *proferentes*." (Lord Watson, p. 354.)

A fortiori is the claimant the *proferens* in the case at bar, where the instrument containing the stipulation in question is expressly signed by him, while in the case of Birrell *v.* Dyer the stipulation of the assured was only implied from the acceptance of a deed-poll or unilateral contract signed only by the other party (the underwriter). The Court should require as much from the claimant as his words of stipulation can fairly and reasonably allow in the interest of that safety to the cargo which the parties evidently intended to insure as far as possible.

The rule *fortius contra proferentem*, as above stated, is practically universal and uniform, and it is only in the case of *excepting* clauses that even apparent departures from it occur; and these are, as we have seen, only apparent not real, the party for whose benefit they are introduced and against whom they are construed being also in each case the promisor or *proferens*, the excepting clauses forming an inseparable part of his undertaking or promise. See Burton *v.* English, 12 Q.B.D., 218, where it was claimed by the ship-owners that the words "at merchant's risk" exempted them from liability for general average contribution to the shipper for the jettison of a deck-cargo; but it was held that, as it was doubtful whether the words were intended to apply only to the ship-owner's liability as a carrier, or whether they extended to, and created an exception to, his liability for general average contribution, this doubt was solved against him, and he was held liable for such contribution.

So in Taylor *v.* Liverpool & Great Western Steam Company, L.R., 9 Q.B., 546, 549–50, where the action was brought to recover the value of a box of diamonds which were stolen while on board the ship, the defendants claimed immunity on the ground that the bill of

lading given by them and which created their liability excepted loss by "thieves," and the question was whether the expression was limited to persons outside the ship or included also persons on board. This doubt in the carrier's contract was solved against him, and it was held that the word "thieves" did not include persons on board, whether passengers or seamen, and that, as the theft was not proved to have been committed by persons coming on board from the wharf, the ship-owners were liable. Mr. Justice Lush said: "The word is ambiguous, and being of doubtful meaning it must receive such a construction as is most in favor of the shipper, and not such as is most in favor of the ship-owner, for whose benefit the exception was framed; for, if it was intended to give to it the larger meaning which is now contended for, the intention to give the ship-owner that protection ought to have been expressed in clear and unambiguous language. It is not, I think, reasonable to suppose, when the language used is ambiguous, that it was intended that the ship-owner should not be liable for thefts by one of the crew or persons on board. The ship-owner must protect himself if he intends this by *the use of unambiguous language;*" showing that the *ratio decidendi* in all cases is that the doubtful language is to be taken most strongly *against the party using it*.

See, also, Hayn *v.* Culliford, L.R., 3 C.P.D., 410, 418, and The Regulus, 23 Fed. Rep., 98, 102.

Independently of the rule, moreover, our definition is an intelligible, rational, definite, and probable one, laying down a course for the vessel with clearness and precision; the claimant's is a vague and indefinite one, and is a sliding scale of separate descriptions rather than a definition at all, and does not lay down any course whatever. If the doubt is not to be solved by the fair preponderance of the evidence, nor *contra proferentem*, it would seem at least that the most sensible of the two definitions ought to be adopted by the Court.

3. If the words have two or more meanings, the Court will adopt the strictest, not "the least strict."

Mallan *v.* May, 13 M. & W., 511.
Simpson *v.* Margitson, 11 Q.B., 23.
Holt *v.* Collyer, 16 L.R. C.D., 718.

Thus in these cases "London" was held to mean the city proper, and not to include the metropolis; "month" to mean the lunar not the calendar month; "beer-house" to mean a place where beer is sold not generally but only to be drunk on the premises.

We ask for a strict construction and one on the side of safety to the cargo, as distinguished from a lax and ineffectual one such as the claimant asks for. The claimant having voluntarily bound himself by an agreement which — on our present hypothesis — has two possible meanings, there is certainly no hardship in holding him to the stricter of the two. If he makes us a promise couched in words having two significations, why should not we have the choice between the two and enjoy the benefit of either?

In conclusion, we ask this Court — with the chart and the facts before it — to construe the contract by choosing between the two interpretations suggested, — to wit: "from Gibraltar to the Great Banks and thence direct to Boston, keeping as much to the north as possible during the entire passage," and "anything north of latitudes 30° to 35° or 36°, or of the trade-winds," — the fairest, the most sensible, the most intelligible, the one that is most likely to accomplish the object of the parties, the one most consonant to the language of the contract, the one that was probably in the minds of the contracting parties.

SUMMARY OF ARGUMENT.

It follows from the foregoing considerations, if they are sound, that either (1) the case is to be remanded to the Circuit Court with instructions to weigh the evidence bearing on the issue of fact as to the disputed phrase, and with the proper instruction as to the burden of proof upon that issue, — final judgment to be entered for the party in whose favor that issue shall be decided; or, (2) if this Court holds it to be immaterial, as the Circuit Court rules it is, to weigh that evidence and find that fact, then the doubt, — if there is any in the minds of the Court upon the record, — as to the meaning of the contract, shall be solved against the claimant (appellee) and in favor of the libellants (appellants), and final judgment ordered accordingly; with the proper direction, in either event, as to the assessment of damages in the Court below.

The liability upon the charter-party is not varied by the giving of the bill of lading in ordinary form, nor limited to the amount of freight by the concluding clause.

Lamb *v.* Parkman, 1 Sprague, 343.
Watts *v.* Camors, 115 U.S. 353, 360–1.

B.

IV.

THE MASTER'S NEGLIGENCE.

As to the legal character of the master's conduct irrespective of the special stipulation in the charter-party, the Circuit Court says, apparently, that it was "an error of judgment not amounting to a rash and almost criminal negligence" (Opinion, p. 16, top), and therefore "not *such* negligence as should require the ship to pay for the loss" (p. 16, top, and 3d Conclusion, p. 10). We submit, on the contrary, that it was, under the circumstances, a want of ordinary care, — and an utter neglect of an obvious precaution, and was therefore actionable negligence; that, if it was "an error of judgment," at all according to any proper use of those words, it was a gross and unpardonable one, for which the record discloses no justification or excuse whatever, and for which the vessel is therefore liable.

The law is clear as to the general definition of actionable negligence and the special definition of a shipmaster's duty.

"Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person, under the existing circumstances, would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion."

R.R. Co. *v.* Jones, 95 U.S., 439, 441.

The master is bound "to take all possible care of the goods, and is responsible for every loss or injury which might have been prevented by human foresight, skill, and prudence."

The Propeller "Niagara," 21 How. 7, 27.

"The master is bound to show that no human diligence, skill, or care could save the property from being lost."

King *v.* Shepherd, 3 Story, C.C., 358.

In the present case any man of ordinary intelligence must have seen, on passing Gibraltar, that a southerly course would be likely to destroy the cargo before he got across, and that a northerly course would probably save it. When he passed Gibraltar the fruit had had an extremely long exposure in the Mediterranean (forty-two days), and had given him warning already. A long ocean-passage was before him; the winter was almost gone (Feb. 19), by the almanac, — in the southern climates entirely gone, what little there is of it; the ship's hold — at best a close and warm place — needs a very cold outside atmosphere to lower its temperature. The very first thought of a reasonably prudent man would be to sail to the northward the moment he passed the Rock and had the open ocean before him. It was the dictate of common sense to do so, to say nothing of "all human foresight, skill, prudence, diligence, and care." (See cases cited *supra*.) Not to do so was to neglect an obvious and simple precaution for a cargo which, in the ordinary course of nature, must already have made considerable progress towards ripening and decay, and had given distinct indications of it some days before reaching Gibraltar.

Would not a rational man, giving his best thought and attention to the safe transportation of that cargo, with three thousand miles more to go, say to himself: "This fruit has been exposed an unusual length of time in the Mediterranean, and is already a little affected before a sixth part of the distance from Palermo to Boston is traversed. What the fruit needs is to get at once into as cold a climate as possible, to arrest this ripening and decaying, which must otherwise, in all human probability, go on with increasing rapidity, with time and the advance of the season, and destroy the cargo altogether. Cold will arrest it; nothing else will. Just as soon as I have passed the Rock I will lay a northerly course, and in a few days I shall be in a safe latitude for the rest of the voyage; and the chances are that my passage will be quicker too as well as cold, because more direct, and so the fruit be doubly safe. To do anything else is to

take risks with the cargo, however comfortable it might be for myself, and my duty is to take no risks whatever, but to do everything I can think of to protect it"?

The same considerations apply of course with ever-increasing force to every subsequent moment of his voyage, and especially to April 7, and we shall advert to them presently. The same principle is involved in them all, the conduct differing only in degree not in kind.

The Circuit Court apparently holds that the master's course was "an error of judgment," but that it did not amount to "rash and almost criminal negligence," and therefore the owners are not liable. (Opinion, p. 16, top.)

In the first place this is not the true rule of law in a civil suit, but the very reverse. It has been distinctly held by this Court that "it is *a wrong position* that a master of a ship is not answerable for *an error in judgment*, but only for the fault of the heart, in civil matters."

Purviance *v.* Angus, 1 Dallas, 180.

The Circuit Court further weakens its unsound legal position by giving as its reason that if the owners were liable "no ship could safely take a perishable cargo." To this reason it is pertinent to reply that no *merchant* could safely *ship* a perishable cargo in a sailing vessel if the master could with impunity commit "errors of judgment" to the verge of "rash and almost criminal negligence," and that the considerations of public policy are quite as strong in favor of the merchant as in favor of the ship-owner. So far as the policy of the law to encourage shipping enterprise is concerned, Congress has set the limit to that indulgence when it exempts ship-owners from liability beyond the value of the ship and freight when they are not themselves privy to the loss.

As to the definition of actionable negligence by the Circuit Court, it is very far removed from the stringent rule laid down in the books (see cases cited, *supra*, pp. 38–9), and if the master is to be liable only for rash and criminal negligence, and consequently bound to exercise only a slight degree of care and prudence in the custody of the cargo, and he need be neither very watchful nor very ener-

getic, nor exercise much intelligence in foreseeing and avoiding danger, but may drift heedlessly into danger with his eyes open, and see the cargo rot away by inches without being required even to simply turn to the north and save it, a new departure is made in the law upon the subject.

We submit, on the contrary, that the true rule of law is so stringent that the master is bound actively to provide against even excepted dangers to the cargo.

Notara *v.* Henderson, 7 L.R., Q.B. 225.

If a master cannot with impunity, as was held in Notara *v.* Henderson, sail securely on with a cargo moistened by an excepted peril, but is bound to turn into a port and tranship his cargo, shall he with impunity sail deliberately on in a latitude where his cargo is heating and steaming, and not be bound to even sail a few hundred miles to the north, especially when he is hundreds of miles south of the latitude of his port of destination?

There is nothing whatever in the record of this case to show that any high degree of intelligence, skill, judgment, or discretion was called for. There is no suggestion whatever on the record that the course the vessel took was likely to be better than or as good as a northerly one. On the contrary, every consideration, both of distance and temperature, favored the latter; only considerations of "ease and comfort" for the master favored the former. Absolutely no excuse or extenuation is suggested for letting our cargo gradually perish through ten weeks of time in a slow sailing vessel (see 8th Finding, p. 8), in warm and mild latitudes and waters. Upon April 7th, it is true, the master attempts to prove *vis major*, but he fails. (See 8th Finding, p. 8.)

The problem before the master, both at Gibraltar and subsequently, was an absolutely simple one; the choice of a course was easy, and the reasons determining what the choice ought to be were all one way. Cold would preserve, warmth decay, the cargo; the farther north the colder, the farther south the warmer it would be; the danger was not only self-evident, very great, and of such a kind that the mischief, if once done, could not possibly be repaired, — for no process of art or nature can restore a decayed orange, — but it

was also imminent, actually impending, and already forewarned distinctly at an early stage of the voyage. To take a southerly instead of a northerly course, under such circumstances, was an *absence* rather than an "*error*" of judgment, a *failure* to exercise any sound discretion at all, rather than a *mistake* in its exercise. It was either a want of ordinary foresight, or a deliberate heedlessness and indifference. No better proof of this could be asked than the master's neglect to take a thermometer with him.

If we were to seek to characterize the master's southerly course, started upon at Gibraltar and persisted in all the way across until at the end of it, on April 24, he is still in the latitude of Gibraltar, and some five hundred miles due south from Boston, it would be difficult to hit upon any words but gross negligence, or an utter, persistent, and almost incredible disregard of the palpable need of the cargo. If the epithets "rash" and "criminal" can be properly used of any negligence not threatening life or person, they apply to this wanton neglect persevered in to the end in the face of constant warning from the beginning, — a musty smell, heating, steaming, flies, — and without any justification or excuse whatever.

There was no mystery about this heating, no difficult or novel problem to solve. It was simply the course of nature, under the circumstances, and nature would stop it if she were simply given a chance. The cause was obvious; the remedy equally so. The thing to do was as natural as it is to move green fruit that is ripening faster than we want it to from a warm closet to a cold one, or to the cellar or refrigerator.

As he proceeds upon his voyage the master keeps in the latitudes of Virginia and the Carolinas. He does not go north, to get the cold climate and water; nor even south to avoid the warm and retarding current of the Gulf Stream, but steers straight for it, gets into it, and stays there all the way, heads directly for the "stormy region of the Gulf Stream," as indicated in print on his own chart (see 7th Finding, p. 8), gets into it, and is in fact detained there by storms for two entire weeks. (See Exhibit "C," March 23–Apr. 7.)

For all this no justification is even suggested upon the record. For his course upon April 7, — which is, if possible, a more aggra-

vated case than anything that precedes, — even the master seems to feel that some justification is called for, and he attempts, as we have seen, to prove that *vis major* prevented him from going north, but fails, and the Court finds the fact against him.

Whatever adjectives may properly characterize his negligence hitherto, we submit that upon April 7 he was as reckless of our cargo as it was possible for a man to be, and that he wantonly or stupidly abandoned it to inevitable and complete ruin.

He was at this time in the latitude of Washington, D.C., some three hundred miles south of that of Boston, and distant from the latter port about one thousand miles, and in the Gulf Stream. On April 7, as soon as the long gale begins to subside, he at once sails *due south for four days several hundred miles* to about the latitude of Beaufort, North Carolina.

It would be hard to overstate either the seriousness or the obviousness of the peril the cargo was in at this time, and the vital importance of avoiding the wrong, and doing the right, thing for its preservation. It had been forty-two days in the Mediterranean, and forty-seven on the Atlantic; it had been heating, and beginning to steam, sure signs that parts at least of the cargo were beginning to decay; the spring was far advanced, and there was a long distance yet to sail in a slow vessel, with the weather daily growing warmer. The days and weeks still before her, if passed in a warm climate and warm water, must obviously destroy the cargo; passed in a cold climate and cold water, they would in all probability save it in great part. The cargo is at stake upon the course the master takes, and it is his last chance to save it. A northerly course will take him hourly into a cold climate and cold water, decay will be arrested, a few days will take the cargo entirely out of the Gulf Stream and out of danger as well as towards port; a southerly course will take him hourly into an even warmer climate and warmer water than he was already in, into sure and ever-increasing danger, and away from port. It is difficult to imagine a more infatuated step, or one more certain to be fatal to the cargo, than the one he took in putting his ship about and sailing away to the southward. For the next four long weeks the cargo is in a summer climate, makes the longitude of

the home port in *the latitude of Cape Hatteras*, makes the land at Long Island, and has to make a *détour* of several days round Cape Cod to get to Boston. (See chart, Exhibit "C.") A greater deviation can hardly be imagined, nor one more utterly and obviously disastrous. The flies soon appear in the cargo (8th Finding, end p. 9), a sure indication of a summer climate and a rotten cargo.

By a striking coincidence, — and as if for the express purpose of pointing and emphasizing the contrast between what the master of the "John H. Pearson" did and what a reasonable and prudent man would do, — another vessel, named the "Messel," was on that very day (April 7) a few miles to the eastward (see Exhibit "C,"), also with a cargo of fruit, bound for Boston; she had been thirty days in the Mediterranean, and had left Gibraltar on the same day as the "John H. Pearson" did. (9th Finding, p. 9.) Having been in the Mediterranean twelve days less than the "John H. Pearson" she had not as strong a motive for extreme care as the "Pearson" had, so that there may have been some justification (which the "John H. Pearson" did not have) for her going south in the first part of her voyage, though it is unnecessary to consider that point, as she is not on trial. Yet what was her course on and after April 7? Exactly what we claim the "John H. Pearson's" should have been. She headed at once to the north, and got her cargo into port with only trifling damage, comparatively. What course could be more obvious and imperative than this? And how much more imperative on the master of the "John H. Pearson" than on that of the "Messel," in view of the longer exposure in the Mediterranean! What course more utterly and outrageously reckless than the one he did take, — a wanton sacrifice of the cargo! If the Court were seeking for a standard and criterion of "due care" and "negligence" in the transportation of a perishable cargo, could it find or devise a better one than is afforded by the conduct of these two masters?

The Circuit Court says, "much discretion must be left to the master, who is on the spot, and who must decide at short notice." The only "discretion" he can have consistently with his duty to exercise "due care" in the preservation of the cargo, is a choice

between two or more courses equally safe. Any other "discretion" would absolve him from all duty to the cargo, and allow him to do as he pleased with impunity. This certainly cannot be the law, for it would make him, and not the Court, the final judge of his conduct, and render him practically irresponsible. He assuredly can have no "discretion" to deliberately choose a course that must almost inevitably destroy the cargo in preference to a clearly safe one. It is true he is "on the spot," and the Court is not; but he has the right to show anything in the condition of either his vessel, the cargo, or the weather which influenced his decision (and the evidence to make that proof is peculiarly within his custody, and difficult to be controlled by us), and the Court is then to decide whether his decision was right. Does he show anything whatever, except a slight injury to his rudder-head, which did not at all interfere with the navigation of his vessel, and his cargo had been heating, and sending up steam out of the hatches for a long time, and the storm had nearly subsided? The Circuit Judge does not point out anything by which the master could justify his action.

What possible justification do the findings in this case disclose for the master's extraordinary course? There were the thousands of boxes of oranges packed together in the hold already steaming, completely encased as if by a great envelope with the warm water of the Gulf Stream, with only a few inches of wood and copper between, and the warm, muggy air of the Gulf-Stream climate entering through the hatches. To the south lies the same state of water and atmosphere, only more so; to the north the very reverse; and that way lies his port of destination too. Where is the room for choice or "discretion"? What "short notice" is there? What is shown to have been happening "on the spot" that this Court cannot judge of perfectly well? What was there for the master to do but keep right on to the north, as the Circuit Court finds he might have (8th Finding), or at least steer straight for Boston? If there is a shadow of excuse, except the master's vacillation, or stupidity, or utter heedlessness, where is it? What would have been "negligence" if the course he took was not? There was but one danger of any kind, and that was a danger to the cargo,

and into that danger he sailed as straight and as fast as he could; there was but one crisis of any kind, and that was a crisis threatening the cargo only, and in that crisis he was utterly heedless of the cargo. As between sure danger, and probable safety, to the cargo, the law gives him no "discretion" to choose the former.

H. W. PUTNAM,
Of Counsel for the Appellants.

121-469

SUPREME COURT OF THE UNITED STATES.

No. 219. October Term, 1886.

LUIGI FILIBERTO ET AL., APPELLANTS,

v.

THE BARK "JOHN H. PEARSON," HIRAM TAYLOR, *Claimant*, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

IN ADMIRALTY.

BRIEF ON BEHALF OF APPELLEE.

FREDERIC DODGE,
of Counsel.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

IN ADMIRALTY.

BRIEF ON BEHALF OF APPELLEE.

STATEMENT OF THE CASE.

1. The appellants shipped a cargo of oranges and lemons from Palermo, Sicily, to Boston, Mass., on the appellee's Bark "John H. Pearson" (January, 1881).

2. On delivery of the cargo at Boston (May, 1881), it was badly decayed, and the loss by decay large.

Findings of Fact 2, p. 7.

3. This loss the appellants claim to hold the Bark for. She was chartered to them, and in the Charter Party was the provision, "Captain engages himself to take the Northern Passage." This provision they accuse the Bark of violating. To her violation of it they seek to ascribe the damage to their cargo. The cargo was kept, as they claim, in warmer water and air than if the "Northern Passage" had been taken.

Libel, Art. 3, p. 2.

The appellee answers that the Bark *did* take the "Northern Passage." Her admitted track on the voyage appears by "Exhibit C," p. 12. This track they say was in the "Northern Passage."

Answer, Art. 3, p. 5.

4. A further charge of negligence is made against the Bark in not keeping as far north and in as cold a climate as she could, and thereby injuring the cargo.

Libel, Art. 4, p. 5.

This charge is also denied by the appellee.

Answer, Art. 4, p. 5.

5. These were the issues between the parties. The District Court decided them in favor of the Bark.

Decree of District Court, p. 6.

So did the Circuit Court on appeal.

Decree of Circuit Court, p. 12.

6. And the appellants complain here —

(1) Of certain principles of law adopted by the Court below in weighing the evidence on the *first* of the above issues, —Was or not the Bark's admitted course within what is known as the "Northern Passage"?

Prayers for Rulings 1–3, p. 9.
Conclusions of Law 1, 2, p. 10.

(2) Of the conclusion of law adopted by the Court below that the facts found were insufficient to warrant a finding against the Bark on the *second* issue, —Was she negligent or not?

Prayers for Rulings 4, p. 10.
Conclusions of Law 3, p. 10.

ARGUMENT ON BEHALF OF APPELLEES.

I.

The Court below was right in the principles of law applied by it to the construction of the agreement to "take the Northern Passage" from Gibraltar to Boston, and to the evidence on the question, — Did the Bark violate this agreement?

PRAYERS FOR RULINGS 1 — CONCLUSIONS OF LAW 1, 2.

The facts found do not of themselves establish any construction of this phrase, still less the construction claimed by appellant (Prayers for Rulings 1, p. 9).

1. In the first of their prayers for rulings, the appellants claim that the Court should decide, *from what appears by the record*, what the "Northern Passage" is, — at least so far as to hold that the Bark's voyage was made outside of it.

If this can be done from the record at all, it is to be done by *inspection of the chart* ("Exhibit C," p. 12), in the light of the facts found (pp. 7–9).

This is entirely impossible.

2. The chart shows: —

(1) The "great circle" track from Gibraltar to Boston and New York — a black dotted line. (2) A straight line drawn on the chart itself from Gibraltar to Boston — a thin red line. (3) A straight line on the chart itself — from Gibraltar to the Grand Banks, and a straight line thence to Boston — broad red line, — and this is the Northern Passage as claimed by appellants (Conclusions of Law 1, p. 10).

Of these lines, (1) belongs to the chart itself; (2) and (3) have been marked on it by appellants to illustrate their argument.

It is true that the Bark's actual course as shown on the chart is south of all these lines.

It does not follow that it is not in the "Northern Passage."

Line (1), the "great circle," is the real straight line and shortest course between Gibraltar and Boston. It would so appear on a globe, though not on the chart, which is a plane projection of a spherical surface. To say that the "Northern Passage" must be to the *north* of this line and the southern passage *south* of it would seem to be the only admissible conclusion, if we are to reason by spherical geometry alone. But the result would be to make a "Southern Passage" of the appellants' own "Northern Passage" — line (3).

Line (2) upon the actual spherical surface represented, is not a straight line at all. It represents what is known in navigation as the "Rhumb" line, — *i.e.*, the line on which Boston is reached from Gibraltar, if the ship be kept all the way on a constant compass course.

It is not, as it looks on the chart, the straight course nor the nearest way. The meridians of longitude, — shown on this chart as everywhere parallel, — are, of course, actually convergent and come together at the pole. They are represented as everywhere parallel for the purpose of showing all "Rhumb" lines as straight lines. A given compass course makes always the same angle with the meridian, and can be shown as a straight line, therefore, only by showing the meridians as parallel. A chart like "Exhibit C," thus showing the meridians, is called a "Mercator's" chart. The higher the latitude the greater the distortion, on such a chart, of the actual region represented. On a long voyage in high latitude the direct or "great circle" course and the "Rhumb" course diverge widely, as illustrated by the divergence of lines (1) and (2).

Bowditch's American Navigator, ed. 1886 (published by Bureau of Navigation), Arts. 61, 63, 67, 129, 130.

Hence it follows that there is no reason whatever for assuming that the "Northern Passage" must be to the north of line (2).

3. The course to be followed by *a sailing vessel* was in the minds of the parties when this Charter Party was made. A steamer might adhere more or less closely to mathematical lines. A sailing vessel depends on winds and currents. No Court can determine, unaided by other evidence than the chart and what appears on it, the line on which, or the ocean regions through which, it was intended to have this Bark sail.

4. Nor is there anything in the facts found to make such a determination more possible.

Give the fullest possible weight to the findings —

That the stipulation about the Northern Passage was inserted "for the benefit of the cargo" (Finding 1, p. 7).

That it is considered "of very great importance" to keep a cargo of fruit "in as cold a temperature as possible" short of freezing (Finding 3, p. 8).

That it has long been the custom to direct vessels "to take a northerly course" (Finding 3, p. 8).

That the Gulf Stream is considerably warmer than the ocean water through which it flows (Finding 7, p. 8).

That the Gulf Stream temperature is warmer the further westward it be taken (Finding 7, p. 8).

The real questions are still no nearer solution —

What temperature is safe for a cargo of fruit, and what is unsafe?

Where in the North Atlantic is the safe temperature found, and where not?

Where can the Gulf Stream be crossed with safety to such a cargo, and where not? seeing that it must be crossed somewhere between Gibraltar and Boston.

What agreement on these points between the parties was implied by the stipulation that "the Northern Passage should be taken"?

5. It will hardly be necessary to argue the insufficiency, for the determination of these questions, of the general presumption that temperature decreases from the equator toward the poles. The isothermal lines are very far from being parallel with the parallels of latitude, and this is a fact of common knowledge. Temperature below 32° Fahrenheit is to be avoided (Finding 3, p. 8). The fact that such a temperature often occurs *on shore* in February, March and April as far south as the latitude of Boston, is of common knowledge in the New England States. Whether this is true also *on the ocean* does not appear by this record. All that does appear by it is this: that the conditions of temperature most favorable to the perishable nature of a fruit cargo, are secured by keeping it where the thermometer is above 32°, and below some point not fixed. And that this temperature is encountered in a North Atlantic voyage by keeping north, but not too far north.

6. No further argument is required to justify the refusal of the Court below to draw, from these premises alone, the conclusion insisted on by appellants in their first prayer for rulings (p. 9), or to demonstrate the correctness of the

conclusion of law (1, p. 10) — that the term "Northern Passage" is "a term of art," and unintelligible without the aid of evidence.

PRAYERS FOR RULINGS 2—CONCLUSIONS OF LAW 1, 2.

> *There is nothing in the facts found which casts upon the appellee any burden of proof, or warrants any presumption which must be rebutted by him* (*Prayers for Rulings* 2, *p.* 9).

7. The appellant's second prayer for rulings (p. 9), insists that if their construction of the "Northern Passage" stipulation is not fully established by the chart and the facts found, it is *so far* established as to cast upon the appellee the burden of disproving it by other evidence.

The appellee submits that in view of 1–6 above *no conclusion whatever* can be drawn as to the meaning of this stipulation in the manner claimed, and that the burden of proof is not affected one way or the other.

What he has to submit on the question of burden of proof is stated below, par. 16.

PRAYERS FOR RULINGS 3—CONCLUSIONS OF LAW 1, 2.

> *Upon a resort to evidence for the meaning of the phrase in question, the stricter construction contended for by the appellant is not established by a mere preponderance of evidence in favor of his construction;—still less in the case of an equal balance of opposing evidence as to the meaning,* (*as claimed in Prayers for Rulings* 3, *p.* 9.)

8. To the term of art "Northern Passage," used in the

contract sued on, the appellants sought to supply a meaning by evidence as to the *commercial usage*. The term being otherwise unintelligible, or ambiguous, such evidence was no doubt competent. The meaning they thus sought to give the term was: "A passage from Gibraltar to the Grand Banks, and thence direct to Boston, keeping as much to the north as possible during the entire passages."

Conclusion of Law 1, p. 10,

or, "north of the Azores, if possible, and if not possible, north of the latitude of the Azores, as soon as possible."

Opinion of the Court, p. 14 (fol. 34).

The broad, red line referred to in paragraph 2, above, as line (3), indicates this route upon the chart, "Exhibit C."

The appellants now claim that if there was a preponderance of the evidence as to usage in favor of their construction, or even if this evidence was equally balanced, the court was, *as matter of law*, bound to adopt their construction as the true meaning of the contract.

Prayer for Rulings 3, p. 9.

But there can be no doubt that the Court was entirely right in refusing to consider itself thus bound, and in declining to find that the appellants' construction was established, so that the bark had been guilty of deviation, — as it did in

Conclusion of Law 2, p. 10.
Opinion of the Court, pp. 14, 15.

9. The appellants had to show, in order to establish their interpretation,—

Not merely that there *is a usage* such as they claim as to the meaning, but that there is a usage *so general, so well*

known and *so universally accepted*, that the parties to this contract *must be presumed* to have used the words in the sense so established.

A few citations may be usefully made, out of many that might be made.

The Paragon, 1 Ware, 322.

(It was sought in this case to show a usage in a certain trade, allowing the carriage of goods shipped under a bill of lading on deck without the shipper's express assent. The evidence was conflicting, a large number of witnesses being examined on both sides (p. 329). The Court thought the preponderance of the evidence against the custom, but did not rest its decision upon that finding alone. It was said, pp. 329, 330: "It is not enough to show that the act which it is pretended that the custom authorizes is sometimes or is often done; you must go further, and show that the right to do it is *so generally recognized that a fair presumption arises* that the parties in forming their engagements silently assent to it, and tacitly agree that their rights shall be determined by the custom.")

Rogers v. *Mechanics Ins. Co.*, 1 Story, 603.

(A usage as to contribution in general average of a certain interest in a whaling voyage was held insufficiently proved. Judge STORY said (p. 607), "It must be some known general usage or custom in the trade, applicable and applied to all the ports of the state where it exists, *and from its character and extent, so notorious that all such contracts of insurance in that trade must be presumed* to be entered into by the parties, with reference to it as a part of the policy.")

Robinson v. *The U. S.*, 13 Wallace, 363.

(It was decided in this case that there is no rule of law requiring more than one witness to prove a usage as to the

implied meaning of a contract on a point as to which it was not express. The Court say (p. 366) : "Parties who contract on a subject matter concerning which known usages prevail, by implication incorporate them into their agreements, if nothing is said to the contrary. . . . We cannot assert as a rule of law governing proof of usages of trade, that if a witness have full knowledge and long experience . . . and testifies explicitly to the antiquity, duration *and universality* of the usage, *and is uncontradicted*, the usage cannot be regarded by the jury as established.")

See also, —

Barnard v. *Kellogg*, 10 Wallace, 384.
Kirchner v. *Venus*, 12 Moore, P. C. 361.
Winsor v. *Dillaway*, 4 Metc. 221.
Porter v. *Hills*, 114 Mass. 106.
Mooney v. *Howard Ins. Co.*, 138 Mass. 375.
Harris v. *Tumbridge*, 83 N.Y. 92, 100.
Lyon v. *Culbertson*, 83 Ill. 33, p. 37.

10. *Such a usage* as is thus shown to be necessary for the appellants' purposes, is not necessarily established by the fact that a *preponderance of the evidence* favors the meaning they contend for.

Parrott v. *Thacher*, 9 Pickg. 425.

(In this case, the jury found that the usage contended for by the plaintiff existed, upon the testimony of one witness who was contradicted by another equally familiar with the business and having the same means of knowledge. The preponderance of the evidence of the one witness over the other, as found by the jury, was held by the Court insufficient to warrant their finding that the usage existed. The Court set the verdict aside saying (p. 430), "Usage is a thing which must be public and notorious, at least known to

all masters of packets in this trade. . . . Now, here is a subject of common knowledge proved by one witness and contradicted by another.")

Porter v. *Hills*, 114 Mass. 106.

(The defendants sought to prove a usage among public storehouse keepers in Boston, that an order on a storehouse for "the balance" of flour in store must state the number of barrels in order to be valid. The alleged usage was denied by the plaintiffs. The court ruled at the trial as to the usage (p. 110), "It must be a custom of sufficiently long continuance, that all parties may be presumed to know it, it must be uniform, it must be universal. It does not show a usage of trade to show that many persons, *or a majority of persons* engaged in the business practice in a particular mode. To constitute a usage of trade so as to have it affect the contract, the practice must be universal. It must be *the* mode in which persons in that trade do their business." And this statement of the law was approved by the full court (p. 111)).

See also Lawson, Usages and Customs, §§ 52, 54.
Carver, Carriage by Sea, § 171.

11. Whether a usage of the character required existed or not was a question of *fact*, and had the case been tried by a jury it would have been a question for the jury alone.

In *Winsor* v. *Dillaway*, 4 Met. 221, cited above, there was opposing evidence as to the existence of a usage. The jury were instructed that "if such a usage was proved to exist and that the defendant knew that such usage existed, it raised an implied promise, &c.," (p. 222). This instruction was approved by the full court, and SHAW, C.J., said (p. 223): "If the usage is so general, so uniform and of

such long continuance that every ship owner might be presumed to be acquainted with it, then the jury might infer the fact of actual knowledge by the defendant . . . But such inference would have been a presumption of fact and not of law, and it would therefore be for the jury and not the court to draw it. There is nothing . . . to show that the jury were not left at full liberty to infer such knowledge from the nature and extent of the usage."

To the same effect are: —

Brown v. *Brown*, 8 Met. 573, p. 576.
Daniels v. *Insurance Co.*, 12 Cush. 416, p. 429.
Law v. *Cross*, 1 Black, 533.

12. The conclusion of the Circuit Judge, therefore, that "the true meaning of the term is very doubtful" (Conclusions of Law 2, p. 10), really amounts to a finding of *fact*, that no such usage existed as was necessary to establish the meaning or definition asserted by the appellants.

See also the Opinion, pp. 14, 15.

The real question is one of *fact*, as shown above, and to find that there is a *serious difference* of expert opinion as to the meaning of the term whose meaning is to be supplied by proof of usage, is to find not only that the state of facts essential to the appellants' claim does not exist, but also to find that a state of facts does exist which is fatal to that claim.

The finding as to *preponderance* of the conflicting evidence, therefore, upon which the appellants insist, may be either way, and the real question remains unaffected. This Court will not, as matter of law, say that it *must be made*.

13. The insufficiency of the appellants' evidence is not

aided by any of the considerations specified in his prayer for rulings 3 (p. 10).

(1) Not by "*the natural meaning of the words and with the purpose contemplated by the parties*," for the reasons indicated above, paragraphs 1–6. For the purposes of this contract the words have no natural meaning, and their commercial meaning only is involved.

(2) Not by the claim that the appellants' construction is "*the most definite and intelligible.*" It is not. Compare the two constructions, either in the Conclusions of Law 1 (p. 10), or in the Opinion of the Court (p. 14). That of the claimant (Appellee) commends itself to practical common sense. "The northern passage was *anything which was not southern.*" "The instructions were given to prevent masters *from taking the easy and comfortable passage* where the *trade winds prevail.*" (Opinion p. 14, fol. 35). "It was admitted that the *southern passage* was *in the trade winds.*" (Conclusions of Law 1, p. 10). On the other hand, the libellants insist upon a *particular line* "direct" from point to point. It is of common knowledge that only a steamer could follow such a line — a sailing vessel could do no more than approximate to it. It must be "as much to the north as possible during the entire passage" and this allows a departure from the standard; varying, but without definite limit of variation, for each particular case.

(3) Not because the appellants' meaning was "*the one understood by the master himself as well as the libellants.*" To assert this is to beg the whole question of fact upon the disputed meaning. The Court has found, as a fact, that no such common understanding of the phrase existed.

The appellants no doubt intend by these words to refer to (Findings of Fact 4, p. 8) the statement made by the master to the news agent upon his arrival at Boston. And

the Court below, for the reasons set forth in the Opinion (p. 15 fol. 37), declined to find, as requested, that this statement proved that common understanding of the phrase which the appellants also sought to prove by evidence of usage.

The testimony of the master and of the news agent were before the Court below. The time, place and surrounding circumstances were fully brought out and argued on there, as they cannot be here; and it cannot be said here, as matter of law, that the Court below has drawn from them a wrong conclusion.

(4) Nor can any aid be derived by the appellants from the claim in favor of their construction that it is "*the strictest against the ship-owners, — the parties using the words in question, — and in favor of the cargo*," (pp. 9, 10). This claim that the words are to be construed "*fortius contra proferentem*," is discussed in the next paragraph.

14. If the maxim invoked has any application to the case, it is important first to determine who is "*proferens*."

It is said in a recent text-book, "It is often difficult to decide who are the *proferentes* with regard to special words of a contract, but this is to be determined in each case upon an examination of the substance and character of words, made in the light of the whole contract and the circumstances surrounding it."

Jones on Construction of Commercial and Trade Contracts (New York, 1886), p. 316, § 230.

An examination of the cases shows, however, that whenever the words appear to have been selected by one of the parties for his own benefit, and by him proposed for the other's acceptance, — although they may be in form a promise by the other, — yet he who selects them is *proferens*, within

the meaning of the maxim, and the construction is to be most strict against him, and most favorable against the other.

This principle has been often applied to *policies of insurance*, as in —

National Bank v. *Ins. Co.*, 95 U.S. 673, p. 679.
Grace v. *Am. Central Ins. Co.*, 109 U.S. 278, p. 282.
Moulor v. *Am. Life Ins. Co.*, 111 U.S. 335, p. 341.

And in like manner to Charter Parties, as in —

Hudson v. *Ede*, L.R. 2 Q.B. 566, p. 578.
Burton v. *English*, L.R. 12 Q.B. 218, pp. 220, 222.
Airey v. *Merrill*, 2 Curtis, 8, p. 11.
Isaakson v. *Williams*, 26 F.R. 642, p. 644.

See also, Scrutton on Charter Parties and Bills of Lading (London, 1886), p. 10, note, "One rule of construction, at any rate, may be applied; viz., that *exceptions* or *clauses introduced in favor of one party* to the contract are to be construed *most strictly against him*."

In the recent case,

Birrell v. *Dryer*, 9 App. Ca. 345,

A question upon construction of a policy of insurance, the maxim, *contra proferentem*, was discussed, and its application, as above claimed, fully recognized, the Court holding that the particular words there under discussion could not be taken as the words of one party more than of the other.

And see —

Carver, Carriage of Goods by Sea, § 172, p. 172.

The same rule of construction prevailed in the civil law.

"*In stipulationibus cum quæritur quid actum sit, verba contra stipulatorem interpretanda sunt*," (Dig. 45, 1, 38, 18).

As is made clear by the fact that in the kind of contract called "*stipulatio*," the *stipulator* was the party who proposed the terms of the contract and selected the words in which they should be expressed, the other party doing nothing but accept the terms so offered him.

Sandars Justinian (6th ed.), p. 332.
Bouvier, Law Dictionary, "*Stipulatio*."
Maine, Ancient Law (London, 1870), 328, 329.

Accordingly we find in the present French code the rule thus stated; —

"*Dans le doute, la convention s'interprète contre celui qui a stipulé, et en faveur de celui qui a contracté l'obligation.*"

Code Civil Liv. III. Tit. III. § V. (*De l'Interpretation des Conventions*), Art. 1162.

And thus applied by the French Courts to the construction of Charter Parties: —

An action was brought, before the Tribunal of Commerce at Marseilles, March, 1885, upon a Charter Party, the charterers suing the master. He had taken on board a cargo of oil cake; a clause in the Charter Party allowed him the right to complete the loading with "other merchandise, the freight to be for his own benefit." The question was, whether "other merchandise" meant any other than oil cake, as the plaintiffs claimed, or any merchandise whatever belonging to other shippers as the master claimed. The decision, after citing article 1162 of the Civil Code, quoted above, proceeds: "Whereas, in the case at bar, the doubt is as complete as possible; whereas if it is reasonable to suppose that the plaintiffs meant to exclude oil cake belonging to

other shippers, on the other hand, it is no less reasonable to confess that the wording of the Charter Party was insufficient to convey that intention to the mind of the agent of the ship who signed that document in Dunkerque; whereas it belonged to the shippers who were stipulating in their own interest to make clear the object of the stipulation;"—and the action was dismissed with costs.

Revue International de Droit-Maritime, 1885–6, p. 44.

(The language is: "Attendu qu'aux termes de l'art. 1162 du Code civil, la convention, dans le doute, s'interprète contre celui qui a stipulé et en faveur de celui qui a contracté l'obligation; qu'en l'espéce, le doute est aussi complet que possible; que s'il est vraisemblable le supposer que les demandeurs ont voulu exclure les tourteaux d'autres chargeurs, d'autre part il est non moins vraisemblable d'admettre que la rédaction de la charte-partie ne suffisait pas à indiquer cette intention à l'armateur qui a signé le document à Dunkerque; qu'il appartenait aux chargeurs, qui stipulaient dans leur intérêt, d'enoncer clairement l'objet de la stipulation; Par ces motifs, Le Tribunal déclare recevable en la forme l'action des demandeurs a l'encontre du capitaine; au fond, des en déboute avec dépens.")

15. In the case at bar it has been specially found as a fact by the Court that the words to be construed were inserted into the Charter Party "at the instance of the libellants for the benefit of the cargo, and written into a printed blank." The appellants seem to take it for granted that the words are, therefore, the words of the ship owners, and therefore to be taken most strongly against them, as *proferentes*. But we submit, on the foregoing authorities, that the law is plainly the exact contrary,—the words were selected and used as their own words by the appellants, and are to be, therefore, most favorably construed in favor of the appellee.

It will be noticed how completely in accord with the authorities cited upon this point is the language of the opin-

ion of the Circuit Court (p. 15), "When the libellants . . . instructed their correspondent in Palermo to insert an agreement for the northern passage, they might properly have expected him to define a course for the vessel." "What I say is, that if the contract contained a technical phrase subjecting the master to an unusual duty, that phrase must be made clear by evidence, or else that part of the contract is unintelligible; or, if there are two constructions, the master might safely adopt either without stopping to inquire whether a few more persons believe it to mean the one than those who thought it to mean the other."

16. *Burden of proof:* Any question that may exist upon this point is also disposed of by the foregoing considerations. The appellants assert a failure on the part of the vessel to observe a certain provision of the Charter Party. The maintenance of this assertion depends upon their attaching, to words in the Charter Party which are of their own selection, a more strict in opposition to a more liberal construction. So far as the burden of proof is of importance it can only be upon them.

The cross-libel for freight, referred to in the judgment of the Circuit Court, is not before this Court by reason of the insufficiency of the amount involved. But such burden as would be on the appellee in that suit to show compliance with the Charter Party is sufficiently sustained on the state of facts here presented. The attempted stricter construction failing to be maintained, the more liberal one, which includes the stricter, is thereby established. With the Charter Party so construed the Bark complied.

II.

The Court below was right in the conclusion of law adopted by it, that the facts found do not amount to proof of negligence.

PRAYERS FOR RULINGS 4.—CONCLUSIONS OF LAW 3.

It does not follow as matter of law from the facts found, that the master was guilty of negligence, and the Bark or her owners therefore liable (*Prayers for Rulings* 4, *p.* 10). *The Court below rightly refused to draw such a conclusion* (*Conclusions of Law* 3, *p.* 10).

1. The appellants' contention is, that the facts show so clearly that the Bark might have followed a more northerly course across the Atlantic, as to compel the master's conviction upon the charge of negligence in following the track by which he did in fact cross.

But the Courts have been uniformly reluctant to come to conclusions of the kind insisted on, because they involve overruling the determinations arrived at by a master at sea in the exercise of his professional judgment as a navigator, upon facts and conditions which it is impossible fully to represent before the tribunal on shore.

Some of the cases are as follows: —

2. *The Bark "Gentleman,"* Olcott 110 (N.Y. 1845).

(The suit was for breach of Charter Party, and a ground of complaint was, unnecessary delay in making the voyage, whereby the cargo of hides became deteriorated in quality. Judge BETTS said: "So many natural causes control the event of voyages that no law giving them proper directions

can be deduced from experience, analogy or the intrinsic character of the employment. To render shipmasters or owners responsible for a matter in its nature so fortuitous, there must be connected with it some culpable act of omission or commission on their part." And the charge was held not sustained. By the report of this case on appeal, — 1 Blatchford, 196 (1846), — it appears that this part of the decision was sustained, although other conclusions contained in it were reversed.)

The Oregon (*Soule* v. *Rodocanachi*), Newberry 504, (D.C., E.D. of La. 1855).

(In a suit for damage to a cargo of coffee the charge was, that the master of the vessel ought to have put back to his port of departure, or have gone into a port of distress, to dry the coffee, which had become wet at sea. The Court said (p. 509): "It is fair to presume that the master, in the exercise of a sound discretion, pursued the course which, under all the circumstances, was deemed most expedient to promote the interests of all concerned. In view of the amount of damage actually ascertained, it is easy to say what might have been done to avoid it. But as it is impossible for us to place ourselves in a position to appreciate all the difficulties encountered by the master, all our speculations upon the propriety of his conduct must necessarily prove unsatisfactory.")

Weston v. *Foster*, 2 Curtis, 119 (Mass. 1854).

(In a suit for the freight agreed by a Charter Party, the charterers claimed that the vessel had not carried all the cargo that she could have carried, and that they were therefore entitled to a deduction. There was conflicting evidence upon the question whether she could have taken more cargo on board or not. In deciding in favor of the vessel, Judge

CURTIS said, page 121, "How deep a particular vessel may safely and prudently be laden with a particular cargo is a matter of judgment. Both the owners and charterers know, when a contract of affreightment is made, that the master, in a foreign port *must* at the time decide this question. They know also that inasmuch as differences of model and spars, and perhaps other circumstances, affect this question, a master who knows his particular vessel and her performance at sea, can judge better than a stranger what cargo she will safely carry. . . . Not to overload his vessel is a duty which the master owes to all concerned. They have a right to expect him to have competent skill and judgment in this particular, and fairly and carefully to exert them. They are not absolutely bound if he makes a mistake. But when he is a person of sufficient skill and judgment and peculiar knowledge of the vessel, and decides honestly and faithfully, very clear evidence of a mistake should be required before his act is pronounced against by the Court.")

The Schooner "Sarah," 2 Sprague, 31 (Mass. 1861.)

(In this case, Judge SPRAGUE was asked, in a suit for non-delivery of cargo, to find that the vessel had deviated, by leaving her course without necessity. She was bound from Wells, Me., to Cambridge, Mass. On the night of September 4, when within ten miles of Thacher's Island Light, at the extremity of Cape Ann, the Captain left his course and put back to Portsmouth, N.H., where he remained several days, until on September 12, the vessel was driven ashore by a gale and the cargo swept overboard. September 8 the master went back to Wells, to vote, and did not return to the vessel till September 10. He claimed that when he put back to Portsmouth he apprehended a gale and deemed it prudent to put back, though there was noth-

ing more than a "pretty stiff breeze" blowing, and the vessel was carrying all her sails. But the Court refused to find the charge of deviation proven, even upon this evidence, saying (p. 31), "Much, in matters of this nature, must be left to the judgment and discretion of the master. On the evidence I am unable to say that the master transcended the limits placed to his authority by law, in leaving his course, in selecting Portsmouth as his place of refuge and in remaining there as long as he did.")

The "Clematis," 1 Brown, 499 (E.D. of Mich. 1872.)

(Libel against a tug for negligence in towage. The tug had three barges in tow on Lake Huron in a storm at night. The tow line parted, and although the tug turned around, she failed to see the lights of the barges and in a few minutes abandoned them and went off down the lake. One of the barges went to pieces in the storm. The Court held that it was for the tug to show an excuse for her abandonment of the barges (p. 500), and that it would not do to allow a tug to excuse herself "for slight causes or on account of even ordinary obstacles." But it also held (p. 502) that "in all such cases much must be left to the judgment of the officers in charge during the emergency. They have the circumstances then all before them far more clearly and intelligibly than they can possibly be reproduced in Court, and when such officers are able, competent and experienced navigators, a judgment formed upon the spot and acted on by them in good faith, ought not to be impeached or disregarded, except upon a clear preponderence of proof that it was erroneous." . . . "I fail to find in the proofs that clear preponderance necessary, in my opinion, to overcome the opinion and judgment of Captain Rumage, formed upon the spot and acted on by him, and I therefore consider it my duty to give him

the benefits of the doubts I entertain.") And in support of this result the decision of this Court in

Lawrence v. *Minturn*, 17 How. 100,

was cited, (where it was said by CURTIS, J., in delivering the judgment of the Court as to the power of the master in regard to jettison (p. 110), "The obligation of the owners is to appoint a competent master having reasonable skill and judgment and courage; and they are liable, if, through his failure to possess or exert these qualities in any emergency, the interest of the shippers is prejudiced. But they do not contract for his infallibility, *nor that he shall do, in an emergency, precisely what, after the event, others may think would have been best.*)

The "Maria Luigia," 28 Fed. Rep. 244 (E.D. of N.Y. 1886, on appeal), was a case in which the same question arose, upon facts in many respects similar to the facts in the case at bar. The charterer sued the vessel for damage to her cargo of fruit, and the negligence complained of was the alleged failure of the vessel, on her passage from Gibraltar to New York, to observe an agreement in the Charter Party that "the vessel on leaving Gibraltar shall go to the northward of the Western Islands and keep north of that latitude, unless absolutely forced south by stress of weather, in which case the vessel's log book shall furnish evidence of that fact." The vessel actually went to the *southward* of the Western Islands, taking the *starboard* instead of the port *tack*, which was the one required if she was to go to the *northward* of them. And the justification entered in the log book was that she suffered too heavily on the port tack from the heavy sea. The District Court (18 Fed. Rep. 556) sustained the charge of negligence; but this decision was reversed on appeal, the opinion of the Circuit Court

(BLATCHFORD, J.) being as follows (p. 248): "Much must be left to the sound judgment of the master at the time; and the criticism which is the result of a wisdom which comes after the event, and is easily made by those who were not on the spot, is a poor substitute for the deliberate conclusion of an experienced man, charged with the responsibility of action under the exigencies of the occasion. His log book shows why he went south and 'furnishes evidence' that he was 'absolutely forced south by stress of weather.' The preponderance of evidence to outweigh such facts as appear in this case and the judgment of a competent master upon them, ought to be very clear."

3. The foregoing citations illustrate the application, at different times and to various sets of facts, by different Admiralty Courts who have had to deal with them, of a principle which commends itself, as soon as stated, to practical common sense.

Applying it to the facts here presented, the appellee may safely concede to the appellants the full benefit of every legitimate inference that can be drawn from those facts in their favor, and may yet confidently claim that, in fairness, no charge of negligence is justified. There is no claim that the master was incompetent.

5. Admit that the master knew when he left Gibraltar that decay was at work.

Findings of Fact 3, p. 8.

Admit that as the voyage progressed he knew that decay was making rapid progress.

Findings of Fact 3, p. 9.

Admit him to be in full possession of all the information

about the Gulf Stream and its stormy region that can be derived either from the findings of fact or the chart, and fully to understand all the advantages that can be attached to a northerly in preference to a southerly course.

If, then, at certain times during the voyage, and particularly on April 7, 1881, his course for the time being is not directed as far to the northward as it might have been under the immediate circumstances (Findings of Fact 5, 8, p. 8), is *negligence* the only conclusion which the Court can draw?

It is submitted that this is stating the question as fairly for the appellants as it can be stated.

5. The statement of such a question is almost equivalent to a settlement of it. Consideration serves only to confirm the first impression. A master finding himself in charge of a fruit cargo tending to decay, on a winter pasage across the North Atlantic, may make north latitude his first object and submit to any prolongation of his voyage rather than pursue it south of a given parallel. Or he may seek rather to get the cargo across as quickly as possible, as the best means of preservation, even at the expense of some degrees of northing. It will not be said that northing must be the *only* object. There will always, then, be a balance to be struck between two opposing considerations. This the master must strike instantly and on the spot, and it is his decision, thus made, that the Court is asked to revise.

A sailing vessel cannot choose her course from hour to hour, except within narrow limits. The winds, and not only their direction but their force, and the probabilities in regard to their future direction and force, dictate to her the course she shall steer at a given time. Such power of choice as the master has must be exercised under the influence of many and various considerations. Beside the facts of winds, sea

and current, there are probabilities and possibilities to be taken into account, which may be strong enough to compel one conclusion at noon, and amount to nothing before night.

6. The appellee submits that the Bark's course, as shown by the chart (Exhibit C), speaks for itself, and shows a succession of attempts to *get north*, resulting in defeat from the violence of the weather. He desires to call attention particularly to her course March 2–7, March 10–13, March 16–20, March 22–30, March 30 to April 9, April 11–13 and April 13–20, as instances of such defeated attempts.

On each of these occasions the master must have turned his back upon the "easy and comfortable" latitudes (Opinion, p. 14, fol. 35) and have chosen instead the more tempestuous and difficult ones.

7. To judge this vessel's course by that of the "*Messel*" (Findings of Fact 9, p. 9), is to be wise after the event. But in all its main features, the voyage of the "Messel" is a proof that the voyage of the "Pearson" was made in good faith and with due care.

The two vessels left Gibraltar on the same day and arrived at Boston within twenty-four hours of each other. They sailed independently of each other.

From the day when they both left Gibraltar the two courses are nearly identical until March 23.

From March 23 to April 10, both vessels were beating about in the "stormy region of the Gulf Stream" (Findings of Fact 7, p. 8) and in a westerly gale (Findings of Fact 8, p. 9), without making any progress toward their destination.

After April 10, when they succeeded in getting clear of this region, the "Messel" kept to the northward of the Gulf

Stream, but the "Pearson" did not cross it until April 24–6. This is relied on as proof of fault on the "Pearson's" part, especially in view of the fact that "upon April 7, when the master turned toward the south he could have turned toward the north" (Findings of fact 8, p. 8).

But it is to be noticed, (1) that on April 7 the "Messel" also turned toward the south (see her course on the chart, April 7–8); (2) that on that day the westerly gale had not completely subsided (Findings of Fact 8, p. 9), and that neither vessel was able to shape her course again until April 9–11 (see their courses on the chart); (3) that the gale left the "Messel" three degrees of latitude further north than it left the "Pearson."

To the result that the "Pearson's" course was conclusive evidence of negligence, whether on April 7 or any later day, all the objections apply which are pointed out in paragraphs 1–5 above; with the further objection that her rudder-head had then suffered an injury in the gale (Findings of Fact 8, p. 8), which might well justify the master in apprehending additional injury and complete disablement of his vessel, from a further encounter with heavy weather.

On behalf of Appellee,

FREDERIC DODGE,
of Counsel.